SUPREME COURT
OF THE UNITED STATES

No. 14-232

Title:	Wesley W. Harris, et al., Appellants
	v.
	Arizona Independent Redistricting Commission, et al.
Docketed:	August 28, 2014
Lower Ct:	United States District Court for the District of Arizona
Case Nos.:	(12-0894)
Decision Date:	April 29, 2014

Questions Presented

—Date—	——Proceedings and Orders——————————
Aug 25 2014	Statement as to jurisdiction filed. (Response due September 29, 2014)
Sep 15 2014	Order extending time to file response to statement as to jurisdiction to and including October 29, 2014.
Sep 17 2014	Waiver of right of appellee Arizona Secretary of State Ken Bennett to respond filed.
Oct 20 2014	Order further extending time to file response to statement as to jurisdiction to and including November 13, 2014.
Nov 13 2014	Motion to dismiss or affirm filed by appellees Arizona Independent Redistricting Commission, et al.
Dec 2 2014	Reply of appellants Wesley W. Harris, et al. filed. (Distributed)
Dec 3 2014	DISTRIBUTED for Conference of January 9, 2015.
Jun 25 2015	DISTRIBUTED for Conference of June 29, 2015.
Jun 30 2015	PROBABLE JURISDICTION NOTED.
Jul 24 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the appellants.
Jul 29 2015	The time to file the joint appendix and appellants' brief on the merits is extended to and including September 4, 2015.
Jul 29 2015	The time to file appellees' brief on the merits is extended to and including October 26, 2015.
Jul 31 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for appellee Arizona Secretary of State Michele Reagan.
Sep 4 2015	Brief of appellee Arizona Secretary of State Michele Reagan in support of appellants filed.
Sep 4 2015	Joint appendix filed.
Sep 4 2015	Brief of appellants Wesley W. Harris, et al. filed.
Sep 10 2015	Brief amicus curiae of Southern Coalition for Social Justice in support of neither party filed.
Oct 9 2015	SET FOR ARGUMENT on Tuesday, DECEMBER 8, 2015
Oct 19 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the appellee Arizona Independent Redistricting Commission.

Oct 19 2015	Record requested from U.S.D.C. District of Arizona.
Oct 26 2015	Brief of appellee Arizona Independent Redistricting Commission filed.
Oct 27 2015	CIRCULATED
Oct 30 2015	Motion for divided argument filed by appellee Arizona Secretary of State Michele Reagan in support of appellants.
Nov 2 2015	Brief amicus curiae of the United States filed. (Distributed)
Nov 2 2015	Brief amici curiae of Former Officials of the U.S. Department of Justice Who Enforced the Voting Rights Act filed. (Distributed)
Nov 2 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 2 2015	Brief amici curiae of The Navajo Nation and Leonard Gorman filed. (Distributed)
Nov 2 2015	Brief amicus curiae of Samuel S. Wang, Ph.D. filed. (Distributed)
Nov 2 2015	Brief amici curiae of Professors Nicholas Stephanoupolis and Simon Jackman filed. (Distributed)
Nov 24 2015	Motion for divided argument filed by appellee Arizona Secretary of State Michele Reagan in support of appellants. GRANTED.
Nov 24 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 25 2015	Reply of appellant Wesley W. Harris, et al. (Distributed)
Nov 25 2015	Letter and 8 1/2 x 11 inch copies of exhibits that appear in appellants' brief on the merits received.
Nov 25 2015	Reply of appellee Arizona Secretary of State Michele Reagan in support of appellants filed. (Distributed)
Dec 8 2015	Argued. For appellants: Mark F. Hearne, II, St. Louis, Mo. For appellee Arizona Secretary of State Michele Reagan in support of appellants: Mark Brnovich, Arizona Attorney General, Phoenix, Ariz. For appellee Arizona Independent Redistricting Commission: Paul M. Smith, Washington, D. C.; and Sarah E. Harrington, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Apr 20 2016	Adjudged to be AFFIRMED. Breyer, J., delivered the opinion for a unanimous Court.

14- 222 No. 14-

IN THE

Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT OF ARIZONA

JURISDICTIONAL STATEMENT

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August 25, 2014

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QUESTIONS PRESENTED

1. Does the desire to gain partisan advantage for one political party justify intentionally creating over-populated legislative districts that result in tens of thousands of individual voters being denied Equal Protection because their individual votes are devalued, violating the one-person, one-vote principle?

2. Does the desire to obtain favorable preclearance review by the Justice Department permit the creation of legislative districts that deviate from the one-person, one-vote principle? And, even if creating unequal districts to obtain preclearance approval was once justified, is this still a legitimate justification after *Shelby County v. Holder*, 133 S.Ct. 2612 (2013)?

3. Was the Arizona redistricting commission correct to disregard the majority-minority rule and rely on race and political party affiliation to create Hispanic "influence" districts?

PARTIES TO THE PROCEEDING

The Appellants here and plaintiffs below are Wesley W Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F Breyer, Beth K. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, Karen M. McKean, and Sharese Steffans (*Harris* voters). These individuals are Arizona citizens and registered voters, and each resides in an over-populated Arizona legislative district.

Appellees and defendants are the Arizona Independent Redistricting Commission, Colleen Mathis, Linda C. McNulty, Scott D. Freeman, Richard Stertz, and Cid R. Kallen (replacing former Commissioner Jose M. Herrera pursuant to Fed.R.Civ.P 25(d)), in their official capacity as members of the Arizona Independent Redistricting Commission, and Ken Bennett, in his official capacity as Arizona Secretary of State.

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JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANTS WESLEY HARRIS, et al.

Appellants Wesley Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Beth K. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, Karen M. McKean, and Sharese Steffans, for themselves and all residents of Arizona whose votes have been diluted by the State's 2012 legislative redistricting plan, appeal to the Supreme Court of the United States from the final judgment, App. 81a, entered in the United States District Court for the District of Arizona.

OPINIONS BELOW

On April 29, 2014, the three-judge district court (Clifton, Silver, Wake, JJ.) entered a *per curiam* memorandum opinion and order that is the subject of this appeal. The *per curiam* opinion is at App. 3a-81a. Judge Silver's concurrence is at App. 82a-104a. Judge Wake's dissent is at App. 105a-145a.

JURISDICTION

The three-judge court entered its final judgment on April 29, 2014. Appellants filed their notice of appeal on June 25, 2014. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973 and 1973c, all reproduced at App. 211a-215a.

STATEMENT OF THE CASE

When the unelected Independent Redistricting Commission (IRC) created Arizona's legislative districts, it violated the Equal Protection Clause by intentionally over-populating Republican districts and under-populating Democrat districts. These deviations violate the "one-person, one-vote" principle recognized in *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), and *Roman v. Sincock*, 377 U.S. 695, 710 (1964). Creating legislative districts with intentional population deviations from the one-person, one-vote zero-deviation ideal to advance one political party's interest or to gain the perceived favor of the Justice Department in preclearance review is contrary to this Court's holdings and the Arizona Constitution.

The three-judge court found the IRC created legislative districts with unequal population to achieve two ends: (1) giving Democrats a partisan advantage and, (2) making it more likely the Justice Department would approve its map under Section 5 of the Voting Rights Act (VRA).

STATEMENT OF THE FACTS

A. Factual Background

"Judge Clifton correctly finds that the IRC was actually motivated by both party advantage and hope for Voting Rights Act preclearance. So we have a majority for that finding of fact."[1]

1. *The IRC was created to take partisan politics out of redistricting and establish legislative districts of equal population that are fair and competitive.*

In 2000, the Arizona Constitution was amended by a citizen initiative intended to "take the redistricting power away from the Arizona Legislature and put it in the hands of a politically neutral commission of citizens who are not active in partisan politics...."[2] The proposition aimed to "end[] the practice of gerrymandering and improv[e] voter and candidate participation in elections by creating an independent commission of balanced appointments to oversee the mapping of fair and competitive congressional and legislative districts."[3]

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[1] App. 107a.

[2] Arizona Secretary of State, 2000 General Election: Ballot Measures, "Fair Districts, Fair Elections," <http://www.azsos.gov/election/2000/General/ballotmeasures.htm> (last visited August 21, 2014).

[3] Arizona Secretary of State, 2000 General Election, <www.azsos.gov/election/2000/info/pubpamphlet/prop2-C-2000.htm> (last visited August 21, 2014).

App. 57a; *see also* App. 146a-152a (ARIZ. CONST. art. 4, pt. 2, § 1(3)-(23)).[4]

Arizona's Constitution further provides: "[p]arty registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals." App. 151a.

The Arizona Constitution requires the IRC to begin the first stage of the redistricting process with "districts of equal population in a grid-like pattern across the state." App. 150a (ARIZ. CONST. art. 4, pt. 2, § 1(14).

The IRC did not follow this equal population requirement, but rather drew the grid map with a population deviation of 4.07%.[5] App. 19a. This deviation, though greater than the equal population required by the Arizona Constitution, was less than half of the nearly 9% deviation the IRC finally adopted. App. 108a.

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[4] The IRC's legitimacy is subject to a separate constitutional challenge brought by the Arizona State Legislature. *See Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, No. 13-1314 (U.S. Supreme Court).

[5] In election law terminology, "population deviation" is the degree to which election districts deviate from the ideal of equal distribution of population among all election districts. Ideally, the populations of all legislative districts within a state are equal. In redistricting, "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

2. The IRC intentionally created more Hispanic "influence" districts because it believed this would increase the likelihood of the Justice Department approving the districts.

The IRC performed no racial or ethnic bloc voting analysis of the draft legislative map. App. 154a-156a. Instead, it relied on an *ad hoc* measurement it called the "Cruz Index" which inferred minority voting preferences based on the results of an election between a Hispanic Democrat and a non-Hispanic, white Republican for the office of Mine Inspector. *Id.*

The IRC ultimately retained Dr. Gary King, to determine whether its proposed legislative plan would satisfy Section 5's non-retrogression requirement.[6] *Id.* It did not study whether any minority populations had not been accommodated under Section 2 of the VRA. *Id.* Dr. King's study first identified ten districts as "ability-to-elect" districts, but he later revised his study to remove districts 24 and 26, leaving eight minority "ability-to-elect" districts. These eight districts were numerically equal to or greater than the 2002

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[6] "Retrogression" refers to a reduction in the minority voting strength. Whether there is any "retrogression" is evaluated by comparing the prior "baseline" districts with those created in a new redistricting. Section 5 prohibits "only those redistricting plans that would have the purpose or effect of worsening the position of minority groups." *Shelby County*, 133 S.Ct. at 2627. "Section 5 was intended to halt actual retrogression in minority voting strength...." *Riley v. Kennedy*, 553 U.S. 406, 432 (2008) (quoting *City of Lockhart v. United States*, 460 U.S. 125, 133 (1983)).

Benchmark Plan and purported to avoid any retrogression. App. 73a, 205a.

The IRC had, thus, drawn sufficient minority "ability-to-elect" districts to avoid retrogression and did not need to create any more minority "ability-to-elect" districts. But the IRC redrew three more "ability-to-elect" districts rationalizing that, by including more Hispanic residents in these districts, the Justice Department might be more likely to preclear the plan. App. 31a.

Dr. Thomas Hofeller opined that neither District 24 nor 26 – both centered in the northern part of Maricopa County – could be Hispanic ability-to-elect districts. App. 188a-189a. Hispanics are not a plurality of the population in District 24, and when analyzing the percentage of the district that actually makes up the district's electorate – citizens of voting age – Hispanic population drops to only 22.8%. App. 243a-244a. Likewise, Hispanics are only 38.5% of the population of District 26. App. 245a, 31a. And when considering citizens of voting age, Hispanics make up only 8.9% of District 26's potential electorate. App. 243a. Hispanic voting age population improved just 2.3% in District 24 and 1.6% in District 26. App. 200a.

The IRC's plan had nothing to do with any legitimate effort to increase Hispanic participation in Arizona's legislature. Instead, the IRC's plan intended to "pack" non-Hispanic-white Republican voters in over-populated districts to gain an advantage for the Democrats by overweighting the votes of Democrat voters in the under-populated

districts. Out of thirty districts, "the 18 with population deviation greater than ±2% from ideal population correlate *perfectly* with Democrat Party advantage." App. 108a (emphasis added).

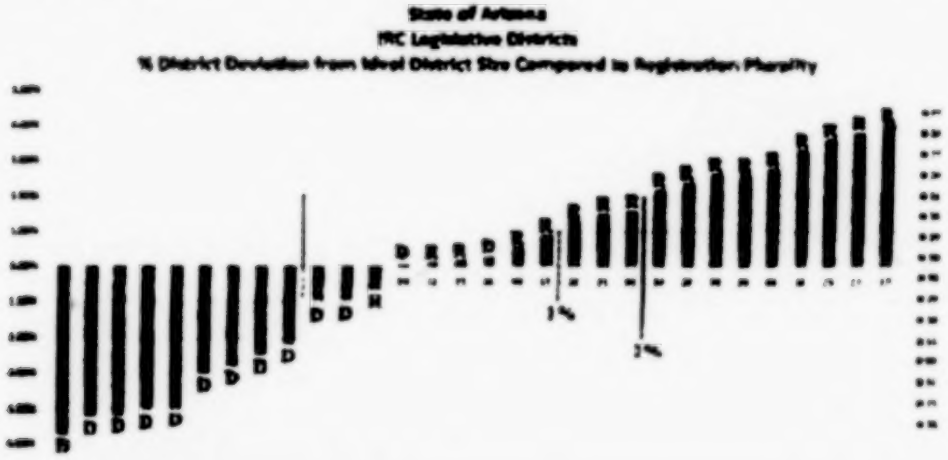
3. *The IRC systematically diluted votes in Republican districts while amplifying the votes in Democrat districts to achieve a partisan advantage for Democrats.*

Nearly 71,000 Arizona voters have been relegated to over-populated, non-Hispanic-white, Republican-plurality districts. And Democrat-plurality "Hispanic influence" districts are under-populated by an equal amount. This intended outcome gives voters in the Democrat districts a greater say than their counterparts in non-Hispanic-white Republican-plurality districts.[7] The total deviation between these districts is close to 9%.

---

[7] The dilutive effects of the Commission's plan are exacerbated by Arizona's unique manner of conducting elections. Unlike many other states, Arizona "nests" its elections – one Senator and two Representatives – in single districts, and legislative elections for both houses are held every two years. The map's constitutional infirmities are thus trebled because they affect three elections instead of just one. *Cf. Chapman v. Meier*, 420 U.S. 1, 25-26 (1975) (holding that in states with small populations where individual votes are more important, "particular emphasis should be placed on establishing districts with as exact population equality as possible").

The following two charts in Judge Wake's dissent tell the story:



			#	%
Democratic registration plurality	7	203,026	-10,041	-4.7
	4	204,143	-8924	-4.2
	27	204,195	-8872	-4.2
	3	204,613	-8454	-4.0
	2	204,615	-8452	-4.0
	24	206,659	-6408	-3.0
	19	207,088	-5979	-2.8
	30	207,763	-5304	-2.5
	8	208,422	-4645	-2.2
Republican registration plurality	14	217,693	+4625	+2.2
	20	218,167	+5099	+2.4
	18	218,677	+5609	+2.6
	28	218,713	+5645	+2.6
	5	219,040	+5972	+2.8
	16	220,157	+7089	+3.3
	25	220,795	+7727	+3.6
	17	221,174	+8106	+3.8
	12	221,735	+8667	+4.1

App. 112a-113a; *see also* App. 209a.

B. Procedural History

The *Harris* voters challenged the IRC's redistricting scheme because the IRC's map violates the Equal Protection Clause. Judges Clifton, Silver, and Wake convened a one-week trial in March 2013 to hear testimony about how the IRC created these districts.

A year later, in April 2014, the three-judge court issued a *per curiam* opinion upholding the IRC's redistricting scheme. Judge Wake dissented and said the IRC's redistricting was unconstitutional. The majority held the IRC's redistricting scheme constitutional because, the majority believed, the challengers had not proven "population deviations were not motivated by legitimate considerations, or possibly, if motivated in part by legitimate considerations, that illegitimate considerations predominated over legitimate considerations." App. 35a-36a.

Judges Clifton and Silver assumed, without finding, that gaining partisan advantage is *not* a legitimate justification for creating districts with unequal population. But they went on to hold a map with legislative districts drawn to advance partisan advantage was nonetheless constitutional because it was *also* drawn with these population deviations because the IRC subjectively believed the deviations were necessary to obtain Justice Department preclearance approval when the IRC first submitted the redistricting scheme to the Justice Department for Section 5 VRA review. App. 23a-24a.

The IRC adopted its map before this Court decided *Shelby County v. Holder*, 133 S.Ct. 2612 (2013). But *Shelby County* was decided before the lower court's decision and after the lower court ordered supplemental briefing regarding *Shelby County*.

Judges Clifton and Silver held that, while *Shelby County* invalidated Section 4(b)'s formula provision, Section 5 remained in force; and, Judges Clifton and Silver reasoned, the IRC's purported desire to obtain preclearance approval by the Justice Department on first submission nonetheless justified the IRC making the significant population deviations that were also made for partisan advantage. App. 69a.

Judge Silver wanted to go even further. She opined that population deviations below ten percent, even if motivated solely by partisanship, did not offend the Equal Protection Clause. App. 88a-93a. Holding that redistricting has "*always* been recognized as a profoundly partisan process," Judge Silver admitted that partisan considerations may go "too far," but she did not believe they had here. App. 88a, 90a (emphasis in original). According to Judge Silver, even if partisanship was the "*actual* and *sole* reason for the population deviations," the deviations still needed to be more than ten percent for voters to even raise a challenge. App. 94a (emphasis in original).

Judge Wake dissented because "[p]artisan advantage is not itself a justification for systematic population inequality in districting," and without some other justification, the IRC's plan must fail.

App. 106a. Judge Wake explained, "[p]arty discrimination in population punishes or favors people on account of their political views. It is discriminatory and invidious. It serves an unfair purpose at the price of a constitutional right that all voters have, regardless of how they plan to vote." App. 118a. He concluded, "[b]are party advantage in systematic population deviation carries no weight against the baseline constitutional imperative of equality of population." *Id.*

Relying on conclusive evidence demonstrating the IRC's systematic over-population of Republican-plurality districts and under-population of Democrat-plurality districts, Judge Wake reasoned the *Harris* voters had shown inequality that was "entirely obvious as a matter of statistics alone." App. 120a; *see also Village of Arlington Heights v. Metro. Housing Development Corp.*, 427 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."). Indeed, there was no other potential explanation because "the neutral principles of districting are politically random, and it is statistically impossible for them to yield this perfect correlation of population inequality...." App. 120a.

Judge Wake then considered whether the IRC's supposed Section 5 preclearance approval motive justified the plan. App. 122a. Judge Wake found obtaining Section 5 preclearance as a motive for creating districts with unequal population evaporated after this Court's decision in *Shelby*

County. Judge Wake then concluded that even if Section 5 was still a valid justification after *Shelby County*, the VRA cannot constitutionally justify systematic population inequality on the basis of race, ethnicity, or partisanship. "Nothing in the text of the [VRA] purports to require or authorize population inequality in legislative districting, directly or by implication." App. 131a.

Because systematic population inequality based on partisan advantage is unjustified, the IRC "could not do again what it did here." App. 139a. Arizona is no longer subject to Section 5 preclearance. And yet, the IRC's legislative districts will continue to govern Arizona's elections until at least 2022, unless this Court overturns the *per curiam* approval of the IRC's redistricting scheme.

REASONS FOR NOTING PROBABLE JURISDICTION

"Allegations of unconstitutional bias in apportionment are most serious claims for [this Court has] long believed that the right to vote is one of those political processes ordinarily to be relied upon to protect minorities."

Vieth v. Jubelirer,
541 U.S. 267, 311-12 (2004).[8]

The court below narrowed this matter to two issues. Either partisan motivations drove the significant population deviations, or the IRC made the population deviations because it believed doing so would curry Justice Department preclearance approval when the plan was first submitted. Since the court below concluded that one of these two motivations drove the deviations, trying to divine which was the "primary" factor is irrelevant because both motives are unconstitutional.

A majority of the three-judge court found the IRC's plan intentionally and systematically deviated from one-person, one-vote legislative districts. App. 34a.[9] The majority (Judges Clifton and Wake) found the IRC adopted these deviations to politically benefit

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[8] Kennedy, J., concurring (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153, n.4 (1938)) (internal quotations omitted).

[9] "The commission does not argue that the population deviations came about by accident but disputes that the motivation was partisanship.... The commission argues that its effort to comply with the [VRA] drove the population deviations." App. 5a.

the Democrat party and to increase the likelihood of first-round preclearance by the Justice Department.

This appeal asks whether these two motives are sufficient justification for creating legislative districts that do not satisfy this Court's one-person, one-vote principle.

The panel also found that political performance in Arizona correlates with minority population,[10] and that the IRC was aware of the correlation.[11] It held that this knowledge could be used for political advantage under the "guise," or pretext, of VRA compliance.[12] Therefore, separating political from racial or ethnic motivation would be difficult.[13]

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[10] "We acknowledge that it is difficult to separate out different motivations in this context. That is particularly true in this instance because the cited motivations [race and partisanship] pulled in exactly the same direction. As a practical matter, changes that strengthen minority ability to elect districts were also changes that improve the prospects of electing Democratic candidates. Those motivations were not cross purposes. They were entirely parallel." App. 36a-37a.

[11] "It is highly likely that the members of the [IRC] were aware of this correlation [between race and partisan political performance]." App. 38a.

[12] "That knowledge [the IRC's understanding of the correlation between race and political performance] could open the door to partisan motivations in both directions. If an individual member of the commission were motivated to favor Democrats, that could have been accomplished under the guise of trying to strengthen minority ability to elect districts." App. 38a.

[13] "Recognizing the difficulty of separating these two motivations, we find [the IRC] was predominately motivated by a legitimate consideration, in compliance with the [VRA]." App. 38a.

Nevertheless, a majority (Judges Clifton and Silver) found that "the primary factor driving the population deviation was the [IRC's] good faith effort to comply with the [VRA] and, in particular, to obtain preclearance from the Department of Justice on the first try." App. 6a.

None of the judges could agree on the applicable standard for deciding plaintiffs' burden of proof under *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

Judge Silver believed plaintiffs must show the "*actual* and *sole* reason" for the challenged population deviation was improper. App. 94a (emphasis in original).

Judge Clifton believed that political motivation, if predominant, could violate the one-person, one-vote principle,[14] but a good faith effort to comply with the VRA was sufficient. App. 60a.

And Judge Wake believed it necessary "to prove that the apportionment was an 'arbitrary or discriminatory policy.'" App. 116a (citing *Larios*, 300 F. Supp. 2d at 1338-39); *Daly v. Hunt*, 903 F.3d 1212, 1220 (4th Cir. 1996).

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[14] Judge Wake also stated that partisanship did not need to be the predominate motive for the map to be constitutionally invalid. App. 116a-117a; 130a. The neutral criteria governing Arizona redistricting, however, effectively eliminates all motivations except two: political and racial or ethnic; and, even if one does not predominate over the other, both are improper. Therefore, the degree of partisan political intent required is not crucial here.

To be clear, this is not a "partisan gerrymandering case." *See Larios*, 300 F. Supp. 2d at 1352 ("[W]e have no occasion to consider the limits of partisan gerrymandering, but rather the very different set of considerations invoked by a claim that the one-person, one-vote principle has been violated. The value at issue today is an individualized and personal one, and therefore the offense to Equal Protection that occurred in this case is more readily apparent than in a claim involving gerrymandering.").

This Court has expressed skepticism about whether partisan gerrymandering is justiciable and, if so, under what standard. *See Davis v. Bandemer*, 478 U.S. 109 (1986) (holding that claims of partisan gerrymandering are justiciable, but disagreeing on the applicable standard for adjudicating such claims); *Vieth*, 541 U.S. at 312 (dismissing challenge to partisan gerrymandering for lack of justiciable standards, but refusing to overrule *Bandemer* lest such a standard is developed).[15]

While the IRC's actions were based on illegitimate partisan motive, this Court need not abstractly decide what election results may be "fair." *See Vieth*, 541 U.S. at 291 ("'Fairness' does not seem

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[15] *See also Fletcher v. Lamone*, 831 F. Supp. 2d 887, 903-04 (D. Md. 2011) ("Absent a clear standard to apply, we must reject the plaintiffs' [partisan gerrymandering] arguments."); *Alabama Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1295-96 (M.D. Ala. 2013) (rejecting standards used in racial gerrymandering claims as unsuitable for claims of political gerrymandering).

to us a judicially manageable standard.") (plurality op.). Nor do the *Harris* voters seek proportionality in Arizona's election results. *See Bandemer*, 478 U.S. at 159 ("Thus, the plurality opinion ultimately rests on a political preference for proportionality-not an outright claim that proportional results are required, but a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes. This preference for proportionality is in serious tension with essential features of state legislative elections.") (O'Connor, J., dissenting).

Instead, the *Harris* voters have alleged a harm – unconstitutional deviations from the one-person, one-vote standard – based on a justicially cognizable legal standard, *i.e.*, population equality, from which a straightforward judicial remedy can be applied. App. 51.[16]

It is one thing when legislative districts are drawn for partisan advantage and the districts are equal (or close to equal) in population. It is a different matter entirely when the districts are drawn to have significantly different populations and the reason for this deviation is an effort to gain advantage for the political party.

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[16] *See also Vieth*, 541 U.S. at 281; *Benisek v. Mack*, 2014 WL 1379098, *6-7 (D. Md. Apr. 8, 2014) (discussing *Vieth* and noting that "the Court distinguished political gerrymandering claims from claims involving districts of unequal population"); *Cunningham v. Mun. of Metro. Seattle*, 751 F Supp. 885, 894 (W. D. Wash. 1990) (holding that ideal population "is computed by dividing the population of the electoral district by the number of representatives on the government body in question").

I. Partisan advantage does not justify violating the one-person, one-vote standard of the Equal Protection Clause.

"The right of all qualified citizens to vote...includes the right to have the vote counted at full value without dilution or discount."

"[T]he Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."

Reynolds v. Sims,
377 U.S. 533, 554-55, 577 (1964).

When it suited the IRC's purposes, it was able to draw districts with zero population deviation. It did so when it drew the congressional districts.[17] But when the IRC drew the legislative districts, it adopted a map with an overall population deviation of almost nine percent.

The charts included in Judge Wake's dissent makes the case. App. 112a-113a (*supra*, p. 9). On the whole, the purpose was to dilute Republican votes and amplify Democrat votes. As Judge Wake observed, "it does not take a Ph.D. to see this stark fact of intended party benefit." App. 120a.

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[17] *See* IRC website, congressional district population data table: <http://azredistricting.org/Maps/Final-Maps/Congressional/Reports/Final%20Congressional%20Districts%20-%20Population%20Data%20Table.pdf> (last visited August 21, 2014).

While some deviation from strict population equality may be justified in some cases, systematic state-wide population deviations motivated by partisan advantage serve no legitimate purpose and offend the principle of one-person, one-vote.

A. This Court did not create a "safe harbor" for legislative districts with population deviations of less than ten-percent.

The *Harris* voters agree that redistricting involves many considerations. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *see also DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1084 (N.D. Fla. 1992) (describing permissive criteria in redistricting as contiguity, compactness, respect for traditional boundaries, maintaining communities of interest and party competitiveness); *Moon v. Meadows*, 952 F. Supp. 1141, 1145 (E.D. Va. 1997) (traditional race-neutral criteria for redistricting include compactness, contiguity, adherence to political subdivision boundaries, and the preservation of interest).

But none of these considerations are as fundamental as the "one person, one vote" principle. In *Gray v. Sanders*, 372 U.S. 368, 381 (1963), this Court held, "[t]he conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote." And in *Reynolds*, 377 U.S. at 554-55, this Court held, "[t]he right of all qualified citizens to vote...includes the right to have the vote counted at full value without dilution or discount.").

The one-person, one-vote principle requires a court to:

> ascertain whether...there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

Roman, 377 U.S. at 710; *see also* App. 107a-108a ("No precedent would require proof and a finding of subjective purpose of party advantage when it is already proven that the systematic numerical inequality has no justification that is legal and reasonable.") (Wake, J, dissenting).

This Court has held, "an apportionment plan with a maximum population deviation under 10%" is insufficient to "make out a *prima facie* case of invidious discrimination." *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). Nothing in this Court's rulings, however, bars plaintiffs from affirmatively proving invidious discrimination.

The ultimate inquiry is whether the redistricting scheme, as a whole, advances a rational state policy, and, if so, "whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits." *Mahan v. Howell*, 410 U.S. 315, 328 (1973). Thus, "[a] State's policy urged in justification of disparity in district population, however rational,

cannot constitutionally be permitted to emasculate the goal of substantial equality." *Id.* at 326. Deviating from population equality is not a means to an end in itself, but must be "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579-80.

This Court has never established an absolute safe-harbor for arbitrary or discriminatory practices. App. 49a; *see also* App. 26a; *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (holding that range of deviation under ten-percent creates "rebuttable presumption" that a plan is constitutional). "Arbitrariness and discrimination disqualify even 'minor' population inequality within 10%." *Id.*; *see also Chapman*, 420 U.S. at 25-26 (noting that redistricting plan with 5.95% population variance may not "necessarily...be permissible in a court-ordered plan").[18]

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[18] *See also Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 364 (S.D.N.Y. 2004) ("We think that...the 'ten percent rule' is not meant to protect a state that is systematically disadvantaging groups of voters with no permissible rational justification for the disproportion."); *Marylanders v. Schaefer*, 849 F. Supp. 1022, 1033 (D. Md. 1994) ("[T]his Court holds that a plaintiff could, with appropriate proof, successfully challenge a redistricting plan with a maximum deviation below ten percent.").

B. This Court's summary affirmance of *Larios* did not create a safe harbor allowing population deviations up to ten percent.

The court below disagreed on the appropriate standard to analyze the *Harris* voters' claim. The three-judge court was heavily influenced by *Larios*, a decision that was summarily affirmed by this Court. App. 61a; *see also Larios*, 300 F. Supp. 2d at 1338, *aff'd* 542 U.S. 947 (2004). But lower courts, like the one below, have struggled with its meaning.[19]

In *Larios*, a federal court overturned Georgia's legislative redistricting plans despite a deviation range of slightly under ten percent. 300 F. Supp. 2d at 1338. This Court affirmed the *Larios* court's judgment, with Justice Stevens rejecting the notion that population deviations of less than ten percent create a "safe harbor" for States to abuse the one-man-one-vote principle. *Cox v. Larios*, 542 U.S. 947, 949-50 (2004) (Stevens, J., concurring).

The district court conceded that "the showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the state's interest, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.*

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[19] *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) ("Summary actions...*should not be understood as breaking new ground but as applying principles established by prior decisions* to the particular facts involved.") (emphasis added).

But it also noted that "[w]here population deviations are not supported by such legitimate interests but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny." *Id.* The district court ruled population deviations based on geography, partisanship, or incumbency could not justify a range of population deviations, even though the range was under ten percent. *Id.* at 1338-40, 1347 The court rejected the Georgia plans, holding that they "did not represent an 'effort to construct districts as nearly of equal population as is practicable.'" *Id.* (citing *Reynolds*, 377 U.S. at 577).

The *Larios* court proceeded to reject the notion that challengers could somehow separate out a map-drawer's legal and illegal motivations, recognizing that "partisan interests are bound up inextricably with the interests of regionalism and incumbent protection." *Id.* at 1352. In *Larios*, there were various motivations for the Georgia redistricting plan: partisan politics, regionalism, disparate growth patterns, race and ethnicity. While no district fell into every category, each challenged district fell into at least one. Had the *Larios* court attempted to review the map in the manner endorsed by the trial court, it would have been impossible to "draw out and isolate" any of the Georgia plan's unlawful motivations. *Id.*

The IRC's discriminatory practices are even more blatant here than in *Larios* because, while Georgia lacked specific constitutionally-mandated criteria, Arizona amended its constitution to explicity prohibit political gerrymandering and required districts to be equally populated. App. 146a-152a.

This Court – even before its summary affirmance in *Larios* – has recognized the interplay between political, geographic, racial and ethnic interests. In *Reynolds*, apart from geography, this Court recognized that "neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation." 377 U.S. at 579-80.[20] Similarly, in *Abate v. Mundt*, 403 U.S. 182, 185-86 (1971), this Court held, "viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs." But, this Court noted "the danger of apportionment structures that contain a built-in bias tending to favor *particular geographic areas or political interests* or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors." *Id.* (citing *Hadley v. Junior College Dist.*, 397 U.S. 50, 57-58 (1970) (emphasis added).

And so, ultimately, the IRC did precisely what this Court said it cannot do. The IRC crafted a legislative redistricting scheme that built in a bias favoring Democrat voters over voters in Republican districts. And the difference is not a small one. Dr. Hofeller calculated that, when measured using citizen voting-age population, the deviation was six

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[20] *See also Hulme v. Madison Cnty.*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001) (rejecting reapportionment scheme with under ten-percent deviation because it was done to maintain political power in a region where population shifts did not justify the result).

times greater, not 8.8%, but 54.81%. App. 243a-244a.

Present-day redistricting technology allows ever-more pinpoint precision, making it more and more likely map-drawers will continue to push the boundaries of this Court's prior rulings. *See Vieth*, 541 U.S. at 312 ("Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months. Technology is both a threat and a promise.") (citation omitted) (Kennedy, J., concurring).

The IRC had this technology and used it to draw congressional districts with a deviation of only one resident. But it chose not to do so when it drew the legislative districts.

As illustrated by Dr. Hofeller's chart, a citizen's vote in the most over-populated district is worth less than *half* a vote in the most under-populated district. App. 243a-244a. This disparity is a stunning violation of the one-person, one-vote principle.

Justice Thomas observed, "the one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population." *Chen v. City of Houston*, 532 U.S. 1046, 1046 (2001) (Thomas, J., dissenting). Justice Thomas's point is that "roughly equalizing district populations without regard to the *citizen voting age* population [will] dilute the value of

votes in districts with larger total populations...." *Id.* (emphasis in original).

The concerns that Justice Thomas raised in *Chen* are even more magnified here where the legislative districts are state-wide and will govern until 2022 at least.

II. The IRC's supposition the Justice Department would more likely approve its redistricting scheme does not justify creating legislative districts with significant population deviation.

> *"[W]e expressed our broader concerns about the constitutionality of the [VRA]. Congress[' failure to] update[] the coverage formula...leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance."*
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> *Shelby County v. Holder*, 133 S.Ct. 2612, 2631 (2013).

The IRC acknowledged it intentionally under-populated Hispanic "opportunity" districts. The IRC defended this departure from population equality by claiming that three of the five commissioners believed these population deviations were necessary for the Justice Department to preclear this map upon first submission. App. 6a. This contention is founded on the further supposition that the VRA's now-invalidated, coverage formula requires the Justice Department to deny approval of a legislative

district map unless it intentionally discriminates on the basis of race or ethnicity. That justification fails.

The IRC's explanation fails for at least three reasons. First, Section 5 is unenforceable in light of *Shelby County*. Second, even if Section 5 were enforceable, it could not justify the IRC's actions. If the VRA conflicts with the constitutional "one-person, one-vote" mandate, the VRA must give way, not the other way around. *See Miller v. Johnson*, 515 U.S. 900, 927 (1995) (noting that Justice Department's then-policy of requiring maximization of majority-minority districts was in constitutional "tension" with the Fourteenth Amendment). And third, the evidence demonstrated the IRC's attempt to invoke Section 5 preclearance was a pretext because districts 8, 24, and 26 were not minority, ability-to-elect districts. Indeed, the IRC itself recognized that district 8 was not an ability-to-elect district, though it claimed to have thought district 8's minority population would still curry favor from the Justice Department.

A. Section 5 of the VRA does not justify the IRC intentionally creating districts with population deviations.

The panel below divided on whether the IRC's professed desire to obtain Section 5 preclearance could justify creating legislative districts with substantial population inequality. This Court held the VRA's coverage formula "can no longer be used as a basis for subjecting jurisdictions to preclearance." *Shelby County*, 133 S.Ct. at 2631. Yet Judges Clifton and Silver held *Shelby County* was meaningless because it was issued after the IRC finished its map.

App. 69a, 35a. Judges Clifton and Silver said this was so, even though the IRC's plan will govern election of the Arizona legislature through 2022. *See* App. 125a.

Judge Wake had the better view. He found that even if Section 5 once justified violations of the one-person, one-vote principle, it no longer does after *Shelby County*. App. 124a-128a. Judges Clifton and Silver's decision to ignore *Shelby County* is similar to a federal district court holding it would be constitutional to racially segregate a school if the segregation was imposed before *Brown v. Board of Education*, 347 U.S. 483 (1954).

Pending civil cases must be decided in accordance with current law. App. 124a.[21] Under the rule of retroactivity, decisions invalidating unconstitutional laws apply to prior government acts, even when those acts were legal under then-existing law. *See Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 97 (1993); *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803 (1989).

In *Davis*, the Supreme Court struck down a Michigan state tax scheme because it violated the constitutional doctrine of intergovernmental tax

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[21] *See also Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974) ("[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice."); *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801) ("[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.").

immunity. *Id.* The *Harper* case then arose out of a similar tax exemption imposed on state and local employees by the State of Virginia. 509 U.S. at 90-91. Following the *Davis* ruling, Virginia repealed its exemption, whereupon federal employees sought a refund of the taxes imposed upon them before *Davis* was decided. The Virginia Supreme Court denied the taxpayers relief, but this Court reversed because Virginia improperly failed to give *Davis* full retroactive effect. *Id.* at 97 (holding that new rules apply to all events at issue "regardless of whether such events predate or postdate [the court's] announcement of the rule").

Judge Wake explained why a pre-*Shelby County* interpretation of the law could not justify the IRC's map:

> To allow the current map to govern successive election cycles until 2020 would give continuing force to Section 5 despite the unconstitutionality of applying it anywhere.

App. 125a.

Indeed, the IRC plan will "continue to dilute voters in Arizona for the next four election cycles of this decade, in disregard of the law that binds us and the rights of hundreds of thousands of voters." App. 127a. And that dilution will have no legal purpose, since preclearance is not a legal requirement for the State of Arizona.

Shelby County must apply here for two additional reasons.

First, each future election will create a new violation. *Shelby County*'s application in this context is not appropriately considered retroactive at all, but instead would bar Arizona from *prospectively* using an unconstitutional map to conduct its elections every two years.

Second, Section 5 operates in an unusual fashion because it does not preempt or invalidate state and local laws, regulations, or procedures. Instead, it only prevents implementation or enforcement of a law until preclearance has occurred. Section 5 thus operates like a statutory injunction. But as a result of *Shelby County*, any such injunctions against the State of Arizona – or even the threat of such injunctions – are no more. The result is not so much an application of retroactivity as it is a return to normalcy. Thus, to the extent Section 5 blocked application of Arizona's constitutional criteria, including its mandate of equally populated districts, that bar has been removed.

B. Systematic and intentional population deviations on the basis of race or ethnicity are not permitted to obtain Section 5 preclearance.

Without Section 5 to justify its actions, the IRC has nothing left on which to base the systematic population deviations the IRC made.[22] The *only*

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[22] This Court has previously warned against "carving electorates into racial blocs," and has specifically forbidden the

premise upon which the lower court justified its approval of the IRC plan was its embrace of the IRC's claim that these systematic population deviations were necessary to win the Justice Department's favor in preclearance review.

Since *Reynolds*, this Court has held population equality must not be "submerged as the controlling consideration in the apportionment of seats in [a] particular legislative body," otherwise "the right of all the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." 377 U.S. at 581. Population equality comes first, not last, among the directives for map-makers.

The IRC's position that it was entitled to dilute or over-weight the voting rights of hundreds of thousands of Arizona voters on the basis of race or ethnicity because of a statute that defends voting rights is more than somewhat ironic.

The VRA declares that nothing in it "shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision." 42 U.S.C § 1973n. And the Justice Department itself explains, "[p]reventing

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Justice Department from interpreting Section 5 to require racial gerrymandering. In *Miller*, 515 U.S. at 927-28, this Court said, "[I]t takes a shortsighted and unauthorized view of the [VRA] to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids."

retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." App. 134a (quoting 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011)).

As Judge Wake noted, "[c]ompliance with the [VRA] requires line-drawing with an eye to expected voting behavior, *but only within equal population*." App. 107a (emphasis added). The Justice Department's decision to preclear the Arizona plan is always subordinate to the constitutional imperative on population equality: "The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person, one-vote principle...." App. 140a (citing Fed. Reg. 7470, 7470 (Feb. 9, 2011)).

C. In any event, the redistricting scheme did not satisfy the VRA's requirements.

The IRC offered no evidence that its redistricting scheme, including changes that doubled the population deviation from the initial four-percent grid map to the almost-nine-percent deviation in the final map, were necessary – or even helpful – for obtaining preclearance.

In the context of VRA compliance, this Court has long held that "in order to tailor the use of race narrowly to its purpose of complying with the Act, a State cannot use racial considerations to achieve results beyond those that are required to comply with the statute." *Johnson*, 515 U.S. at 926. Likewise, in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 519 (2006), this Court held that:

> [t]o support its use of § 5 compliance as a compelling interest with respect to a particular redistricting decision, the State must demonstrate that such compliance was its actual purpose, and that it had a strong basis for believing that the redistricting decision at issue was reasonably necessary under a constitutional reading and application of the [VRA]."[23]

In short, it is not enough to simply invoke the VRA when using race as the predominant criteria for district composition. App. 131a-132a. There must also be a "strong basis" for believing that the adopted course of action was "reasonably necessary," and that there was a reasonable result that is arguably consistent with the statute.

The IRC did not choose to merely avoid retrogression. Instead, it believed it could enhance its opportunity for preclearance by increasing the number of supposed "Hispanic influence" districts, and perhaps crossover districts, describing them as Hispanic "opportunity" districts.

The IRC's decision to draw the additional crossover and influence districts implicates the exact same concerns that this Court identified in *Bartlett v. Strickland*, 556 U.S. 1 (2009). While this Court may have reserved the majority-minority question under Section 5, this Court said, "[i]f § 2 were interpreted to protect this kind of influence, it would unnecessarily

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[23] Citations and quotation marks omitted.

infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC*, 548 U.S. at 446; *see also Thornburg v. Gingles*, 478 U.S. 30 (1986); *Bartlett*, 556 U.S. at 19 ("In majority-minority districts, a minority group composes a numerical, working majority of the voting age population.").

This Court has emphatically rejected the argument that the VRA requires the creation of so-called "coalition" districts, combining a hodge-podge of racial/ethnic minority voters on the sole basis of their racial/ethnic status. *Id.*; *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1391 (6th Cir. 1996) ("Coalition suits provide minority groups with a political advantage not recognized by our form of government, and not authorized by the constitutional and statutory underpinnings of that structure.").

The IRC identified eight minority ability-to-elect districts in its draft plan, a number equal to the number of similar districts in the Benchmark Plan, thus claiming to satisfy Section 5's retrogression requirement. The IRC, however, admits that even after it settled on those districts, it used racial and ethnic considerations to redraw three additional districts—districts 8, 24, and 26. Of these, it claimed that two (districts 24 and 26) were "ability-to-elect" districts. The IRC itself recognized that District 8 was not an ability-to-elect district, but purportedly thought redrawing it still might do some good in the preclearance process.

But there was no valid basis for the IRC's beliefs, as the districts it drew had no valid VRA purpose. In District 8, for example, Hispanics made

up only 30.5% of the voting-age population. App. 243a. Non-Hispanic-whites, on the other hand, made up 53.4%. App. 246a. Taking the IRC's claim at face value, that it truly drew this district based on race or ethnicity, the question remains: For what purpose? Certainly none that satisfies strict scrutiny.

Districts 24 and 26 were similarly flawed. In District 24, 41.3% of the population is Hispanic, short of a majority. App. 246a. And the contention that District 24 is some kind of "opportunity" district is even less credible when citizen voting-age population is considered.[24] By that crucial metric, Hispanics populate only 22.8% of the district. *See Campos*, 113 F.3d at 548 ("[O]nly voting-age persons who are United States citizens can vote.") District 24 simply could not be considered an ability-to-elect district, and, in fact, District 24 elected no minority candidates during the 2012 election. App. 163a-164a.

District 26 has similar demographics as District 24. The Hispanic percentage of total population is 38.5%. App. 246a. But when citizens of voting age are counted, the district's Hispanic percentage drops to only 18.7%. App. 243a-244a.

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[24] *See Negron v. City of Miami Beach, Fla.*, 113 F.3d 1563, 1571 (11th Cir. 1997) ("[W]e conclude that the first *Gingles* precondition requires the consideration of citizenship information...when that information is reasonably accurate and demonstrates a significant difference between minority and majority citizenship rates."); *Campos v. City of Houston*, 113 F.3d 544, 547-48 (5th Cir. 1997) (holding that citizen voting-age population was proper factor by which to determine satisfaction of the first *Gingles* precondition).

This is the critical point that the *per curiam* opinion missed. Unless the plan reflected an actual effort at VRA compliance, then the IRC engaged in the kind of racially-charged gerrymandering this Court disfavors. *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996) (holding that racial and ethnic gerrymandering as a pretext districting scheme is constitutionally suspect even where the purpose of the racial classification is "benign or the purpose remedial."). Here, the IRC used racial and ethnic gerrymandering to justify the systematic population deviations in its plan. That is inimical to foundational constitutional principles.

The IRC was in the same "somewhat unusual posture" as the "[s]tate authorities who created a district [and] now invoke the VRA as a defense." *Bartlett*, 556 U.S. at 6. The IRC's justification for the additional "Hispanic-influence" districts derived from an election for Mine Inspector, puts courts in exactly the place this Court said they should not be. In *Bartlett*, this Court said a redistricting scheme should not be premised upon justification:

> requir[ing] courts to make predictive political judgments...[that] would be speculative at best given that, especially in the context of local elections, voters' personal affiliations with candidates and views on particular issues can play a large role.
>
> 556 U.S. at 18.

The only defense to this contention the IRC offered was that it received legal advice that its predominant consideration of race and ethnicity was justified. But advice of counsel has long been rejected as a method of insulating map-makers from the effects of their illegal motives. *See Larios*, 300 F. Supp. 2d at 1353, n.16 (holding that reliance on faulty legal advice will not remedy constitutional infirmities (citing *Raske v. Martinez*, 876 F.2d 1496, 1502 (11th Cir. 1989)).

At the end of the day, the IRC's reliance on Section 5 proves too much. The challengers had the burden of showing the IRC's "unconstitutional or irrational state policy" was the "actual reason" for the population deviations in the plan. *Marylanders*, 849 F. Supp. at 1032-33 (citing *Karcher v. Daggett*, 462 U.S. 725, 740-44 (1983)). But the IRC admits that it adopted systematic population deviations, if not for reasons of purely partisan advantage, then (at best) to achieve unnecessary and constitutionally-infirm racial gerrymandering. Either way, the IRC's legislative redistricting scheme is invalid.

III. Because the new Hispanic "influence" districts did not satisfy the requirements of Section 2 of the VRA, the use of race or ethnicity as a predominant factor in their creation was impermissible.

"Disregarding the majority-minority rule and relying on a combination of race and party to presume an effective majority would involve the law and courts in a perilous enterprise."

Bartlett v. Strickland, 556 U.S. 1, 22 (2009).

The IRC could not justify its redistricting scheme under either Section 5 or Section 2 of the VRA. Because it admits that it used race as a predominant motive for drawing the map, the map is invalid.

In *Bartlett*, the Court considered whether a state could use Section 2 of the VRA to defend its creation of minority "influence" districts, as distinct from the creation of majority-minority districts. 556 U.S. at 6. The Court's plurality said "no." *Id.* at 25-26. Only districts with 50% or more minority citizen voting-age population satisfy Section 2. *Id.*

North Carolina election officials claimed Section 2 required map-drawers to create opportunity districts, even though doing so violated a state constitutional command. *Bartlett*, 556 U.S. at 6-7, 26-27 ("The question in this case is whether a minority with under 50% of the voting population of a proposed voting district can ever qualify under § 2 of

the VRA as residents of a putative district whose minority voters would have an opportunity to elect representatives of their choice.") (Souter, J., dissenting). So-called "influence" districts contain less than 50% minority citizen voting-age population. *Id.* at 3. The Court ruled North Carolina could not shield its violation of a state constitutional command behind the VRA. Instead, the Court concluded that Section 2 requires that only majority-minority citizens-voting-age population districts be drawn. Stated differently, a government cannot create "opportunity" districts by invoking Section 2. *Id.* at 19, 24-25, 27 ("In the plurality's view, only a district with a minority population making up 50% or more of the citizen voting age population can provide a remedy to minority voters lacking an opportunity to elect representatives of their choice.") (Souter, J., dissenting).

Here, the IRC *admits* the map contains no district with 50% or more Hispanic citizen voting-age population.[25] They merely contend that *Bartlett* was only concerned with voting age population. 556 U.S. at 32, n.6. Justice Souter's dissent, however, makes it clear that the *Bartlett* plurality was, in fact, discussing citizen voting-age population. *Id.* at 27

Furthermore, the *Harris* voters are not here contending that Arizona's adopted map violates Section 2. The point is that the IRC cannot justify its map under either Section 2 or Section 5 of the VRA. *Shelby County* confirms that Arizona cannot rely upon Section 5. And it cannot rely upon Section 2

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[25] Def. Post-trial Br., 2013 WL 1727989, p. 32 (§ 3(B)(1)(a)).

because, as the IRC readily admits, "[t]he map adopted in 2012 had no districts with [Hispanic-citizen-voting-age-population] over 50%."[26]

CONCLUSION

The IRC did not redistrict Arizona's legislature in conformity with the Equal Protection Clause ideal of one-person, one-vote. Rather the IRC drew districts that deviated from this ideal by almost nine-percent and did so for two illegitimate reasons. First to gain a partisan advantage for one political party and, second, in the belief that doing so would curry favor with the Justice Department allowing the redistricting scheme to be precleared. Neither of these objectives justifies violating the Equal Protection Clause mandate of one-person, one-vote.

The Arizona voters bringing this appeal ask this Court to assert jurisdiction, hear argument, reverse the lower court's judgment, and direct that Arizona's legislative districts be established in conformity with the Equal Protection Clause of the United States Constitution and Arizona's enumerated constitutional criteria.

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[26] *Supra*, note 25, at 32.

Respectfully submitted,

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APPENDIX

APPENDIX A — PLAINTIFFS' NOTICE OF APPEAL FROM FINAL JUDGMENT TO THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA, FILED JUNE 25, 2014

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Case No. CV 12-0894-PHX-ROS

Wesley W. Harris, *et al.*,

Plaintiffs,

v.

Arizona Independent Redistricting Commission, *et al.*,

Defendants.

PLAINTIFFS' NOTICE OF APPEAL FROM FINAL JUDGMENT

Assigned to District Judges Silver and
Wake and Circuit Judge Clifton

Notice is given that plaintiffs Wesley W. Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Beth K. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, Paula J. Linker, Karen M. MacKean, and Sherese L. Steffens appeal to the Supreme Court of the United States from the final judgment entered in this action on April 29, 2014. This appeal is taken pursuant to 28 U.S.C. § 1253 and 28 U.S.C. § 2101(b).

Appendix A

Respectfully submitted on June 25, 2014.

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APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED APRIL 29, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-12-894-PHX-ROS-NVW-RRC

WESLEY W. HARRIS, *et al.*,

Plaintiffs,

vs.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Defendants.

April 29, 2014, Filed

OPINION

Before: CLIFTON, Circuit Judge, and SILVER and WAKE, District Judges.

PER CURIAM:

Plaintiffs, individual voters registered in the State of Arizona, challenge the map drawn for state legislative districts by the Arizona Independent Redistricting Commission for use starting in 2012, based on the 2010

census. They argue that the Commission underpopulated Democrat-leaning districts and overpopulated Republican-leaning districts for partisan reasons, in violation of the Fourteenth Amendment's one-person, one-vote principle. The Commission denies that it was driven by partisanship, explaining that the population deviations were driven by its efforts to comply with Section 5 of the Voting Rights Act. We conclude that the population deviations were primarily a result of good-faith efforts to comply with the Voting Rights Act, and that even though partisanship played some role in the design of the map, the Fourteenth Amendment challenge fails.[1]

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1. This per curiam opinion speaks for a majority of the court in all but one respect. On the issue of the burden of proof that plaintiffs must bear, there is not a majority opinion. See the specific discussion on that subject below, at 42-43 n. 10.

Judge Silver concurs in the result and joins this opinion in all but three respects. One is the burden of proof requirement just mentioned. There is no majority conclusion on that subject. Her second difference is with the factual finding that partisanship played some part in the drafting of the legislative district maps, primarily discussed below in section II.I, at 23-28, and to some extent in section IV.C, at 53-54. She finds that partisanship did not play a role. The finding on that subject expressed in this opinion represents a majority consisting of Judge Clifton and Judge Wake. The third disagreement, previously announced, was from the majority's denial prior to trial of defendants' motion for abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), discussed below in section III.B, at 33-36. That motion was denied by a majority consisting of Judge Clifton and Judge Wake. Judge Silver's separate views are expressed in a separate opinion, concurring in part, dissenting in part, and concurring in the judgment, filed together with this per curiam opinion.

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The one-person, one-vote requirement of the Equal Protection Clause of the Fourteenth Amendment does not require that legislative districts have precisely equal population, but provides that divergences must be "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds v. Sims*, 377 U.S. 533, 579, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The majority of the overpopulated districts in the map drawn by the Commission were Republican-leaning, while the majority of the underpopulated districts leaned Democratic. Plaintiffs' complaint alleged that this correlation was no accident, that partisanship drove it, and that partisanship is not a permissible reason to deviate from population equality in redistricting.

The Commission does not argue that the population deviations came about by accident, but it disputes that the motivation was partisanship. Most of the underpopulated districts have significant minority populations, and the Commission presented them to the Department of Justice as districts in which minority groups would have the opportunity to elect candidates of their choice. Section 5 of the Voting Rights Act required that the Commission obtain preclearance from the Department before its plan went into effect. To obtain preclearance, the Commission

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Judge Wake dissents from the result reached in this opinion, though he joins portions of it. In addition to the finding that partisanship played some role, identified in the preceding paragraph, he specifically joins in section III of this opinion, at 28-40, discussing our resolution of pretrial motions. His views are expressed in his separate opinion, concurring in part, dissenting in part, and dissenting from the judgment, also filed together with this opinion.

had to show that any proposed changes would not diminish the ability of minority groups to elect the candidates of their choice. The Commission argues that its effort to comply with the Voting Rights Act drove the population deviations.

For the purpose of this opinion, we assume without deciding that partisanship is not a legitimate reason to deviate from population equality. We find that the primary factor driving the population deviation was the Commission's good-faith effort to comply with the Voting Rights Act and, in particular, to obtain preclearance from the Department of Justice on the first try. The commissioners were aware of the political consequences of redistricting, however, and we find that some of the commissioners were motivated in part in some of the linedrawing decisions by a desire to improve Democratic prospects in the affected districts. Nonetheless, the Fourteenth Amendment gives states some degree of leeway in drawing their own legislative districts and, because compliance with federal voting rights law was the predominant reason for the deviations, we conclude that no federal constitutional violation occurred.

We do not decide whether any violations of state law occurred. Though plaintiffs have alleged violations of state law and the Arizona Constitution, we decided early in the proceedings and announced in a prior order that Arizona's courts are the proper forum for such claims. We discuss that subject further below, at 32-33. We express no opinion on whether the redistricting plan violated the equal population clause of the Arizona Constitution, whether the Commission violated state law in adopting

the grid map with population variations rather than strict population equality, or whether state law prohibits adjusting legislative districts for partisan reasons. All that we consider is whether a federal constitutional violation occurred.

At trial, plaintiffs focused on three districts that they argued were not true Voting Rights Districts and therefore could not justify population deviations: Districts 8, 24, and 26. Accordingly, this opinion largely focuses on the population shifts associated with the creation of these three districts.

I. Course of Proceedings

Plaintiffs filed this action on April 27, 2012, and subsequently filed a First Amended Complaint. This three-judge district court was convened pursuant to 28 U.S.C. § 2284(a). Plaintiffs sought a declaration that the final legislative map violated both the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and the equal population requirement of the Arizona Constitution, an injunction against enforcing the map, and a mandate that the Commission draw a new map for legislative elections following the 2012 elections. Originally, not only was the Commission a defendant in this action, but so too were each of the five commissioners in their official capacities.[2]

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2. Arizona Secretary of State Ken Bennett, sued in his official capacity, is also a nominal defendant in the action. When we refer to "defendants" in this opinion, however, we refer collectively to the Commission and commissioners.

Defendants moved to dismiss the complaint for failure to state a claim. In a reasoned order, we denied the motion. Plaintiffs then filed a Second Amended Complaint.

Prior to trial, the parties filed several motions that the court summarily disposed of on February 22, 2013. First, defendants moved to stay the case pending the resolution of state-law claims in state court, which we denied. Defendants also moved for a protective order on the basis of legislative privilege, which we denied. Finally, defendants moved for judgment on the pleadings, asking for dismissal of the individual commissioners as defendants and for dismissal of plaintiffs' claim for relief under the equal population requirement of the Arizona Constitution. We granted this motion, dismissing the individual commissioners from the suit and dismissing plaintiffs' second claim for relief. We explain the bases for our rulings on these motions later in this opinion, at 28-40.

Starting March 25, 2013, we presided over a five-day bench trial. Among other witnesses, all five commissioners testified.

II. Findings of Fact

Most of the factual findings below, based in large part on transcripts of public hearings and other documents in the public record, were not disputed at trial. Rather, what was most controverted was what inferences about the Commission's motivation we should draw from the largely undisputed facts. We discuss that issue, whether and to what extent partisanship motivated the Commission, at the end of this section, at 23-28.

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To the extent any finding of fact should more properly be designated a conclusion of law, it should be treated as a conclusion of law. Similarly, to the extent any conclusion of law should more properly be designated a finding of fact, it should be treated as a finding of fact.

A. The Approved Legislative Redistricting Plan

The first election cycle using the legislative map drawn by the Commission took place in 2012. Arizona has thirty legislative districts, each of which elects two representatives and one senator. Ariz. Const. art. IV, pt. 2, § 1. The following chart summarizes pertinent electoral results and population statistics for the Commission's 2012 legislative map, which we explain in greater detail below.

District	Percentage Deviation from Ideal Population	Presented to DOJ as Ability to-Elect District	Party Affiliation of Senator Elected in 2012	Party Affiliation of Representatives Elected in 2012
1	1.6%		Republican	Two Republicans
2	-4.0%	Yes	Democrat	Two Democrats
3	-4.0%	Yes	Democrat	Two Democrats
4	-4.2%	Yes	Democrat	Two Democrats
5	2.8%		Republican	Two Republicans
6	0.6%		Republican	Two Republicans
7	-4.7%	Yes	Democrat	Two Democrats
8	-2.2%		Democrat	Two Republicans

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9	0.1%		Democrat	One Democrat, One Republican
10	-0.9%		Democrat	Two Democrats
11	0.1%		Republican	Two Republicans
12	4.1%		Republican	Two Republicans
13	-0.6%		Republican	Two Republicans
14	2.2%		Republican	Two Republicans
15	0.9%		Republican	Two Republicans
16	3.3%		Republican	Two Republicans
17	3.8%		Republican	Two Republicans
18	2.6%		Republican	Two Republicans
19	-2.8%	Yes	Democrat	Two Democrats
20	2.4%		Republican	Two Republicans
21	1.5%		Republican	Two Republicans
22	1.3%		Republican	Two Republicans
23	0.2%		Republican	Two Republicans
24	-3.0%	Yes	Democrat	Two Democrats
25	3.6%		Republican	Two Republicans
26	0.3%	Yes	Democrat	Two Democrats
27	-4.2%	Yes	Democrat	Two Democrats
28	2.6%		Republican	One Democrat, One Republican
29	-0.9%	Yes	Democrat	Two Democrats
30	-2.5%	Yes	Democrat	Two Democrats

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Figure 1. *2012 Legislative Map Statistics.*

In the 2012 elections, Republicans won a total of 36 out of the 60 house seats, winning both seats in 17 districts and 1 seat in 2 districts. Democrats won the remaining 24 house seats, winning 2 seats in 11 districts and 1 seat in 2 districts. Republicans won 17 out of 30 senate seats, and Democrats won the remaining 13. The Democratic senate candidate narrowly won in District 8, but the Republican candidate might have won if not for the presence of a Libertarian candidate in the race.[3] In all, 16 districts elected only Republicans to the state legislative houses, 11 districts elected only Democrats, and 3 districts elected a combination of Republicans and Democrats.

Ideal population is the average per-district population, or the population each district would have if population was evenly distributed across all districts. Of the 16 districts that elected only Republicans to the state legislature, 15 were above the ideal population and 1 was below. Of the 11 districts that elected only Democrats to the state legislature, 2 were above the ideal population and 11 were below. District 8 was below ideal population, and the other 2 districts that elected legislators from both parties were above ideal population.

Of the 10 districts the Commission presented to the Department of Justice as districts in which minority

3. The Democratic candidate in District 8 won with 49 percent of the vote; the Republican received 46 percent of the vote, and the Libertarian candidate received the remaining 5 percent. Republicans won both of the state house races in District 8.

candidates could elect candidates of their choice, or "ability-to-elect districts," all 10 only elected Democrats to the state legislature in 2012. Nine out of ten of these ability-to-elect districts were below the ideal population, and one was above.

Of the 9 districts presented to the Department of Justice as districts in which Hispanics could elect a candidate of their choice, all but District 24 elected at least one Hispanic candidate to the state legislature in the 2012 elections. In District 26, only one of the three legislators elected in 2012 was of Hispanic descent. Of the 27 state legislators elected in the purported ability-to-elect districts, 16 were of Hispanic descent.

District 7 was presented to the Department of Justice as a district in which Native Americans could elect candidates of their choice, and it elected Native American candidates in all three of its state legislative races.

Maximum population deviation refers to the difference, in terms of percentage deviation from the ideal population, between the most populated district and the least populated district in the map. In the approved legislative map, maximum population deviation was 8.8 percent; District 12 had the largest population, at 4.1 percent over the ideal population, and District 7 had the smallest population, at 4.7 percent under the ideal.

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B. Formation of the Commission

In 2000, Arizona voters amended the state constitution by passing Proposition 106, an initiative removing responsibility for congressional and legislative redistricting from the state legislature and placing it in the newly established Independent Redistricting Commission. *See* Ariz. Const. art. IV, pt. 2, § 1(3). Five citizens serve on the Commission, consisting of two Republicans, two Democrats, and one unaffiliated with either major party. *See id.* § 1(3)-(5). Selection of the commissioners begins with the Arizona Commission on Appellate Court Appointments, which interviews applicants and creates a slate of ten Republican candidates, ten Democratic candidates, and five independent or unaffiliated candidates. *See id.* § 1(4)-(5). Four commissioners are appointed from the party slates, one by each of the party leaders from the two chambers of the legislature. *See id.* § 1(6). Once appointed, those four commissioners select the fifth commissioner from the slate of unaffiliated candidates, and the fifth commissioner also serves as the commission chair. *Id.* § 1(8).

Pursuant to these requirements, Republican commissioners Scott Freeman and Richard Stertz were appointed by the Speaker of the House and the President of the Senate, respectively, and Democratic commissioners Jose Herrera and Linda McNulty were appointed by the House Minority Leader and Senate Minority Leader, respectively. Commissioners Freeman, Stertz, Herrera, and McNulty then interviewed all five candidates on the unaffiliated slate.

In his interview notes, Commissioner Stertz noted his concerns with the liberal leanings of most of the candidates on the unaffiliated list. For example, he wrote that Kimber Lanning's fundraising efforts were almost all for Democrats, and that her Facebook page indicated a fondness for Van Jones.[4] Paul Bender, another candidate, served on the board of the ACLU. Margaret Silva identified Cesar Chavez as her hero, and her Facebook profile picture featured her alongside Nancy Pelosi, the Democratic leader in the U.S. House of Representatives. Ray Bladine was his first choice for the position, whom Stertz described as balanced despite Bladine's former tenure as chief of staff for a Democratic mayor.

In a public meeting, the four commissioners unanimously selected Colleen Mathis as the fifth commissioner and chairwoman. In his interview notes Commissioner Stertz described her as balanced, though noting that she and her husband had supported Democratic candidates. Mathis and her husband had also made contributions to Republican candidates.

C. Selection of Counsel and Mapping Consultant

The Commission has authority to hire legal counsel to "represent the people of Arizona in the legal defense of a redistricting plan," as well as staff and consultants to assist with the mapping process. Ariz. Const. art. IV, pt.

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4. Van Jones served as a special advisor to President Obama in 2009. He resigned that position after criticism from conservatives and Republicans.

2, §§ 1(19), (20). The selection of the Commission's counsel and mapping consultant sparked public controversy, and plaintiffs argue that the process reflected a partisan bias on the part of Chairwoman Mathis.

The previous Commission, after the 2000 census, had retained a Democratic attorney and a Republican attorney. Chairwoman Mathis expressed interest in hiring one attorney instead of two, as the counsel hired would represent the entire Commission. The other four commissioners preferred to hire two attorneys with different party affiliations, however. That is what the Commission decided to do.

The Commission used the State Procurement Office to help retain counsel and interviewed attorneys from six law firms. Among the interviewees were the two attorneys who had worked for the previous Commission: Lisa Hauser, an attorney with the firm of Gammage & Burnham and a Republican, and Michael Mandell, an attorney with the Mandell Law Firm and a Democrat. Other attorneys interviewed by the Commission included Mary O'Grady, a Democrat with Osborn Maledon, and Joe Kanefield, a Republican with Ballard Spahr. Osborn Maledon and Ballard Spahr received the highest scores from the Commission based on forms provided by the State Procurement Office for use in the selection process. Nonetheless, Commissioner Herrera expressed a preference for retaining Mandell as Democratic counsel, and Commissioners Stertz and Freeman preferred Hauser and Gammage & Burnham as Republican counsel.

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In a public meeting, Commissioner Herrera moved to retain Osborn Maledon and Ballard Spahr at Chairwoman Mathis's suggestion. Commissioner Herrera later explained that while Mandell was his first choice, Osborn Maledon and Ballard Spahr received the highest evaluation scores. Commissioner Freeman expressed his preference for Gammage & Burnham, and said he would give deference to the Democratic commissioners' preference for Democratic counsel if they would do the same for the Republican commissioners. Commissioner Stertz then made a motion to amend, to instead retain the Mandell Law Firm and Gammage & Burnham. The amendment was defeated on a 2-3 vote, with Commissioners Stertz and Freeman voting for it and Commissioners Mathis, Herrera, and McNulty voting against. The motion to retain Osborn Maledon and Ballard Spahr carried with a 3-2 vote, with Commissioners Mathis, Herrera, and McNulty voting for the motion and Commissioners Stertz and Freeman voting against. The Commission thus selected a Republican attorney for whom neither of the Republican commissioners voted.

In selecting a mapping consultant, the Commission initially worked with the State Procurement Office. An applicant for the position had to submit, among other things, an explanation of its capabilities to perform the work, any previous redistricting experience, any partisan connections, and a cost sheet. In the initial round of scoring, each applicant was scored on a 1000-point scale. Each commissioner independently filled out a scoring sheet, which considered capability to do the work but not cost, rating each applicant on a 700-point scale. The State

Procurement Office rated each applicant on a 300-point scale, 200 points of which evaluated the relative cost of the bid.

The Commission considered the first round of scoring, and then announced a short list of four firms that it would interview for the mapping consultant position. Those firms were Strategic Telemetry, National Demographics, Research Advisory Services, and Terra Systems Southwest. National Demographics, which had served as mapping consultant for the previous Commission, had received the highest score in the first round of evaluations.

The Commission interviewed the four selected firms in a public meeting. During the interview of the head of National Demographics, Commissioner Herrera expressed concern that there was a perception that the firm was affiliated with Republican interests. National Demographics had worked for both Democratic and Republican clients, though more Republicans than Democrats. In interviewing Strategic Telemetry, Commissioners Freeman and Stertz asked whether, because Strategic Telemetry had worked for a number of Democratic clients but no Republican clients, the firm would be perceived as biased.

After these interviews, the commissioners conducted a second round of scoring before selecting a firm. In this round of scoring, Commissioners Mathis, Herrera, and McNulty all gave Strategic Telemetry a perfect score. Strategic Telemetry came out of this round with the highest overall score. Prior to the public meeting in which

the Commission voted to retain a mapping consultant, Chairwoman Mathis made a phone call to Commissioner Stertz and asked him to support the choice of Strategic Telemetry.

The Commission selected Strategic Telemetry as the mapping consultant on a 3-2 vote, with Commissioners McNulty, Herrera, and Mathis voting in favor, and Commissioners Freeman and Stertz voting against. Before the vote, Commissioners Freeman and Stertz had expressed a preference for National Demographics.

At subsequent meetings, the Commission heard extensive criticism from members of the public about the selection of Strategic Telemetry. Much of the criticism related to the Democratic affiliations of the firm and to the fact that it was based out of Washington, D.C., rather than Arizona. Strategic Telemetry was founded primarily as a microtargeting firm, which uses statistical analyses of voter opinions to assist political campaigns. Ken Strasma, president and founder of Strategic Telemetry, considered himself a Democrat, as did most of the other employees of the firm. The firm had worked for Democratic, independent, and nonpartisan campaigns, but no Republican campaigns. While Strasma had redistricting experience in more than thirty states before he founded the firm in 2003, the firm itself had no statewide redistricting experience at the time of its bid, nor any redistricting experience in Arizona. Also making Strategic Telemetry a controversial choice was that it had submitted the most expensive bid to the Commission. All of this was known to the Commission when Strategic

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Telemetry was selected as the mapping consultant for the Commission and when Commissioners Mathis, Herrera, and McNulty each gave Strategic Telemetry a perfect score of 700 points during the second round of scoring.

D. The Grid Map

The Commission was required to begin the mapping process by creating "districts of equal population in a grid-like pattern across the state." Ariz. Const. art. IV, pt. 2, § 1(14). The Commission directed its mapping consultant to prepare two alternative grid maps. Believing that the Arizona Constitution intended the Commission to begin with a clean slate, several commissioners expressed interest in having an element of randomness in the generation of the grid map. The Commission decided, after a series of coin flips, that the consultant would generate two alternative grid maps, one beginning in the center of the state and moving out counterclockwise, and the other with districts starting in the southeast corner of the state, moving inwards clockwise.

After the two maps were presented, the Commission voted to adopt the second alternative. The grid map selected had a maximum population deviation—the difference between the most populated and least populated district—of 4.07 percent of the average district population.

E. Voting Rights Act Preclearance Requirement

During the redistricting cycle at issue, Arizona was subject to the requirements of Section 5 of the Voting

Rights Act.[5] Before a state covered by Section 5 can implement a redistricting plan, the state must prove that its proposed plan "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a).[6] The state must either institute an action with the U.S. District Court for the District of Columbia for a declaratory judgment that the plan has no such purpose or effect, or, as the Commission did here, submit the plan to the U.S. Department of Justice. If the Justice Department does not object within sixty days, the plan has been precleared and the state may implement it. *See id.*

A plan has an impermissible effect under Section 5 if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478, 117 S. Ct. 1491, 137 L. Ed. 2d 730 (1997). A redistricting plan leads to retrogression when, compared to the plan currently in effect, the new plan diminishes

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5. In a case decided after the implementation of the Commission's new redistricting plan, the Supreme Court held unconstitutional the coverage formula used to determine which states are subject to the Section 5 preclearance requirement. *See Shelby County v. Holder*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013). We discuss the impact of *Shelby County* on this case in our conclusions of law, at 47-49.

6. In order to better understand the factual findings that follow, some understanding of the requirements of the Voting Rights Act is useful. We include this discussion as background, acknowledging that it incorporates conclusions of law, albeit for the most part conclusions that do not appear to us to be controversial.

the ability of minority groups to "elect their preferred candidates of choice." *See id.*; 42 U.S.C. § 1973c(b). There is no retrogression so long as the number of ability-to-elect districts does not decrease from the benchmark to the proposed plan. *Texas v. United States*, 887 F. Supp. 2d 133, 157 (D.D.C. 2012) (citing *Abrams v. Johnson*, 521 U.S. 74, 97-98, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997)), *vacated and remanded*, 133 S. Ct. 2885, 186 L. Ed. 2d 930 (2013) (remanding for further consideration in light of *Shelby County v. Holder*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013)).

A district gives a minority group the opportunity to elect the candidate of its choice not only when the minority group makes up a majority of the district's population (a majority-minority district), but also when it can elect its preferred candidate with the help of another minority group (a coalition district) or white voters (crossover districts). *Texas*, 887 F. Supp. 2d at 147-49. A minority group's preferred candidate need not be a member of the racial minority. *Cf. Ruiz v. City of Santa Maria*, 160 F.3d 543, 552 (9th Cir. 1998) (discussing minority candidates of choice for the purposes of Section 2 of the Voting Rights Act). "Ability to elect" properly refers to the ability to elect the preferred candidate of Hispanic voters from the given district, which is not necessarily the same thing as the ability to elect a Hispanic candidate from that district, though there is obvious overlap between those two concepts.

In determining the ability to elect in districts in the proposed and benchmark plan, the Department of Justice

begins its review of a plan submitted for preclearance by analyzing the districts with current census data. 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). The analysis is a complex one relying on more than just census numbers, however, and does not turn on reaching a fixed percentage of minority population. Rather, the Department looks at additional demographic data such as group voting patterns, electoral participation, election history, and voter turnout. *Id.* at 7471; *see also Texas*, 887 F. Supp. 2d at 150 ("There is no single, clearly defined metric to determine when a minority group has an ability to elect, so we use a multi-factored approach to determine when a coalition or crossover district achieves that ability.").

Several aspects of the preclearance process encourage states to do more than the bare minimum to avoid retrogression. First, state officials do not know exactly what is required to achieve preclearance. As explained above, the Department of Justice relies on a variety of data in assessing retrogression, rather than assessing a fixed goal that states can easily ascertain. Bruce Cain, an expert in Voting Rights Act compliance in redistricting who served as a consultant to the Commission following the 2000 census and was retained for this lawsuit by the current Commission, testified at trial that the lack of clear rules creates "regulatory uncertainty" that forces states "to be cautious and to take extra steps."

Moreover, the preclearance process with respect to any particular plan is generally an opaque one. When the Department of Justice objects to a plan, the state receives an explanation of the basis for the objection. When the

Department does not object, by contrast, the state receives no such information. In other words, the state does not know how many benchmark districts the Department believed there were nor how many ability-to-elect districts the Department concluded were in the proposed plan. Nor does it know whether the new plan barely precleared or could have done with fewer ability-to-elect districts.

Consultants and attorneys hired by a state to assist with the preclearance process may also tend to encourage taking additional steps to achieve preclearance. The professional reputation of a consultant gives him a strong incentive to ensure that the jurisdictions he advises obtain preclearance. The Commission, for example, asked applicants to serve as its mapping consultant whether they had previously worked with states in redistricting and whether those jurisdictions had succeeded in gaining preclearance on the first try.

These factors may work together to tilt the board somewhat because they encourage a state that wants to obtain preclearance to overshoot the mark, particularly if it wants its first submission to be approved. Because it is not clear where the Justice Department will draw the line, there is a natural incentive to provide a margin of error or to aim higher than might actually be necessary. Attorneys and consultants, aware that their professional reputations may be affected, can be motivated to push in that direction.

The Arizona Commission early in the process identified obtaining preclearance on its first attempt as a priority.

All of the commissioners, Democrats and Republicans alike, shared this goal. In prior decades, Arizona had never obtained preclearance from the Department of Justice for its legislative redistricting plan based upon its first submission. The Commission was aware that, among other consequences, failure to preclear would make Arizona ineligible to bail out as a Section 5 jurisdiction for another ten years. *See* 42 U.S.C. § 1973b(a)(1). Although the Commission considered and often adjusted lines to meet other goals, it put a priority on compliance with the Voting Rights Act and, in particular, on obtaining preclearance on the first attempt.

F. The Draft Map

After adopting a grid map, the Commission was directed by the Arizona Constitution to adjust the map to comply with the United States Constitution and the federal Voting Rights Act. Ariz. Const. art. IV, pt. 2, § 1(14). It was also instructed to adjust the map, "to the extent practicable," to comply with five other enumerated criteria: (1) equality of population between districts; (2) geographic compactness and contiguity; (3) respect for communities of interest; (4) respect for visible geographic features, city, town and county boundaries, and undivided census tracts; and (5) competitiveness, if it would "create no significant detriment to the other goals." *Id.* The map approved by the Commission after the first round of these adjustments was only a draft map, which was required to undergo public comment and a further round of revisions before final approval. *Id.* § 1(16).

Appendix B

Before beginning to adjust the grid map, the Commission received presentations on the Voting Rights Act from its attorneys, its mapping consultant, and its Voting Rights Act consultant Bruce Adelson. Adelson previously worked for the Department of Justice, where he led the team that had reviewed and objected to the first legislative map submitted by Arizona for preclearance in 2002. Adelson gave the Commission an overview of the preclearance process. He explained that determining whether a minority population had the ability to elect was a complex analysis that turned on more than just the percentage of minorities in a district. He explained, for example, that in reviewing Arizona's submission from the prior decade, the Department had found a district where it concluded that minorities had an ability to elect even though they made up only between 30 and 40 percent of the population. Adelson informed the Commission at that time that he believed the 2002 map that was ultimately approved had nine districts in which minorities had an ability to elect their preferred candidates. Because the preclearance process focused on making sure there was no retrogression, that number was the benchmark, meaning that the new plan had to achieve at least the same number of ability-to-elect districts.

One of the most important factors the Department of Justice considers in determining the ability to elect in a district is its level of racial polarization, which is a measure of the voting tendencies of whites and minorities in elections pitting a white candidate against a minority candidate. A racial polarization study is a statistical analysis of past election results to determine the level

of racial polarization in a district. When it first started considering potential benchmark districts, the Commission did not have any formal racial polarization analysis at its disposal and relied primarily on demographic data from the 2010 census. The Commission eventually retained Professor Gary King, a social scientist at Harvard University recommended by the Commission's counsel, to conduct a racial polarization analysis.

Until the Commission had a formal racial polarization analysis, it often used what it called the "Cruz Index" to assess whether voters in an area might support a Hispanic candidate. Devised by Commissioners McNulty and Stertz, the Cruz Index used data from the 2010 election for Mine Inspector, a statewide race pitting Joe Hart, a Republican, non-Hispanic white (or Anglo) candidate, against Manuel Cruz, a Democrat, Hispanic candidate. The Cruz Index, sometimes described by commissioners and staff as a "down and dirty" measure, was not intended to be the Commission's only analysis of cohesion in minority voting in proposed districts, but rather a rough proxy until the Commission had formal racial polarization analysis. In the end, however, the voting pattern estimates derived from the Cruz Index wound up corresponding closely to the voting pattern estimates King derived from his formal statistical analysis.

To explore possible adjustments to the grid map, the commissioners could either direct the mapping consultant to create a map with a certain change or use mapping software to make changes themselves. They referred to these maps as "what if" maps because the maps simply

showed possible line changes that the Commission might choose to incorporate into the draft map. Willie Desmond was the Strategic Telemetry employee with primary responsibility for assisting commissioners with the mapping software or creating "what if" maps at their direction.

The Commission originally operated on the assumption that it had to create nine ability-to-elect districts, based on Adelson's report that there were nine benchmark districts. As a result, the earliest "what if" maps focused on creating nine minority ability-to-elect districts. Commissioner Freeman, for example, directed Desmond to create several maps that would create nine ability-to-elect districts.

Soon, however, the Commission began considering the possibility that there might be ten benchmark districts. Counsel advised that there were some districts without a majority-minority population that had a history of electing minority candidates, such as District 23 from the 2002 legislative map. Counsel further explained that, even though there were seven majority-minority benchmark districts and two to three other districts where minorities did not make up the majority, they nonetheless might be viewed as having the ability to elect. Because it was uncertain how many benchmark and ability-to-elect districts the Department of Justice would determine existed, counsel advised that creating ten districts would increase the odds of getting precleared on the first attempt.

The Commission worked to make Districts 24 and 26 ones in which, despite lacking a majority of the population, Hispanics could elect candidates of their choice. At this point, the Commission was still relying on the Cruz Index to predict minority voting patterns in proposed districts. As the Commission explored shifting boundaries to create ability-to-elect districts, their mapping consultant apprised the Commission of the effects of the shifts on various statistics, such as minority voting population, the Cruz Index, and the deviation from average district population. Counsel advised the Commission that some population disparity was permissible if it was a result of compliance with the Voting Rights Act.

On October 10, 2011, the Commission approved a draft legislative map on a 4-1 vote, with all but Commissioner Stertz voting in favor of the map. That map had ten districts identified by the Commission as minority ability-to-elect districts.

G. The Effort to Remove Chairwoman Mathis

The Arizona Constitution prescribes at least a thirty-day comment period after the adoption of the draft map. Ariz. Const. art. IV, pt. 2, § 1(16). The Commission did not begin working on the final map until late November, however, because of a delay resulting from an effort to remove Chairwoman Mathis from the Commission.

On October 26, Governor Janice Brewer sent a letter to the Commission alleging it had committed "substantial neglect of duty and gross misconduct in office" for, among

other things, the manner in which it selected the mapping consultant. On November 1, the Governor's office informed Chairwoman Mathis that it would remove her from the Commission for committing gross misconduct in office, conditioned upon the concurrence of two-thirds of the Arizona Senate. The Arizona Constitution permits the governor to remove a member of the Commission, with concurrence of two-thirds of the Senate, for "substantial neglect of duty" or "gross misconduct in office." Ariz. Const. art. IV, pt. 2, § 1(10). After the Senate concurred in the removal of Chairwoman Mathis in a special session, the Commission petitioned the Arizona Supreme Court for the reinstatement of Chairwoman Mathis on the basis that the Governor had exceeded her authority under the Arizona Constitution. *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 275 P.3d 1267, 1270 (Ariz. 2012). On November 17, that court ordered the reinstatement of Chairwoman Mathis, concluding that the Governor did not have legal cause to remove her. *Id.* at 1268, 1276-78.

H. The Final Map

On November 29, the Commission began working to modify the draft map to create the final map it would submit to the Department of Justice. Because of the delay caused by the effort to remove Chairwoman Mathis, the Commission felt under pressure to finalize its work in time to permit election officials and prospective candidates to prepare for the 2012 elections, knowing that the preclearance process would also take time.

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The Commission received a draft racial polarization voting analysis prepared by King and Strasma. According to the draft analysis, minorities would be able to elect candidates of their choice in all ten proposed ability-to-elect districts in the draft map.

The Commission received advice from its attorneys and consultants as to the importance of presenting the Department of Justice with at least ten ability-to-elect districts. Adelson said that, based on the information he had received since his earlier assessment, he believed the Department would conclude that there were ten benchmark districts. He also emphasized that, due to the uncertainty in determining what constitutes a benchmark district, the Department might determine there were more benchmark districts than what the Commission had concluded. Counsel advised the Commission that it would be "prudent to stay the course in terms of the ten districts that are in the draft map and look to strengthen them if there is a way to strengthen them."

The Commission also received advice that it could use population shifts, within certain limits, to strengthen these districts. Adelson advised the Commission that underpopulating minority districts was an acceptable tool for complying with the Voting Rights Act, so long as the maximum deviation remained within ten percent. According to Adelson, underpopulating districts to increase the proportion of minorities was an "accepted redistricting tool" and something that the Department of Justice looked at favorably when assessing compliance with Section 5. According to Strasma, underpopulation

could strengthen the districts in several ways. First, it could increase the percentage of minority voters in a district. Second, it could account for expected growth in the Hispanic districts, which might otherwise become overpopulated in the decade following the implementation of a new map.

The Commission directed Strasma and Adelson to look for ways to strengthen the ability-to-elect districts and report back. At a subsequent meeting, Strasma, Adelson, and Desmond presented a number of options for improving the districts along with the trade-offs associated with those changes. Strasma identified Districts 24 and 26 in particular as districts that might warrant further efforts to strengthen the minority ability to elect. Doing so would increase the likelihood that the Department of Justice would recognize those districts as ability-to-elect districts and thus the likelihood that the plan would obtain preclearance.

The Commission adopted a number of changes to Districts 24 and 26, including many purportedly aimed at strengthening the minority population's ability to elect. Between the draft map and final map, the Hispanic population in District 24 increased from 38.6 percent to 41.3 percent, and the Hispanic voting-age population increased from 31.8 percent to 34.1 percent. In District 26, the Hispanic population increased from 36.8 percent to 38.5 percent, and the Hispanic voting-age population increased from 30.4 percent to 32 percent.

A consequence of these changes was an increase in population inequality. District 24's population decreased from 0.2 percent above the ideal population to 3 percent below. District 26's population increased from 0.1 percent above the ideal population to 0.3 percent above.

Commissioner McNulty asked Desmond to explore possibilities for making either District 8 or 11 more competitive. Desmond presented an option to the Commission that would have made District 8 more competitive. The Republican commissioners expressed opposition to the proposed change. Commissioner Stertz argued that the change favored Democrats in District 8 while "hyperpacking" Republicans into District 11. Commissioner Freeman argued that competitiveness should be applied "fairly and evenhandedly" across the state rather than just advantaging one party in a particular district. The Republican commissioners were correct that the change would necessarily favor Democratic electoral prospects given that the voter registration in the existing versions of both Districts 8 and 11 favored Republicans and that Commissioner McNulty did not propose any corresponding effort to make any Democratic-leaning districts more competitive. Commissioner McNulty was absent from the meetings in which these initial discussions occurred, but Commissioner Herrera noted that competitiveness was one of the criteria the Commission was required to consider and expressed support for the change.

Commissioner McNulty asked Desmond to try a few other ways of shifting the lines between Districts 8 and

11, one of which would have kept several communities with high minority populations together in District 8. Commissioner McNulty, noting that the area had a history of having an opportunity to elect, raised the possibility that the change might also preserve that opportunity. Adelson opined that, if the minority population of District 8 were increased slightly, the Commission might be able to present it to the Department of Justice as an eleventh opportunity-to-elect district, which would "unquestionably enhance the submission and enhance chances for preclearance." Counsel suggested that having another possible ability-to-elect district could be helpful because District 26 was not as strong of an ability-to-elect district as the other districts.

District 8 contained many of the same concentrations of minority populations as the district identified as District 23 in the previous decade's plan. The comparable district in that region of the state had a history of electing minority candidates prior to the 2002 redistricting cycle. In 2002, the Department of Justice identified that district as one of the reasons why the Commission did not obtain preclearance of its first proposed plan in that cycle. Although the Commission later argued to the Department of Justice in its 2012 submission that the minorities could not consistently elect their candidate of choice in that district between 2002 and 2012, several minority candidates had been elected to the state legislature from the district in that time period.

The Commission voted 3-2 to implement Commissioner McNulty's proposed change into the working map and send

it to Dr. King for further analysis, with the Republican commissioners voting against. This was the only change order that resulted in a divided vote.

This change order also affected the population count of Districts 11, 12, and 16. The order changed the deviation from ideal population from 1.5 percent to -2.3 percent in District 8, from 1.9 percent to 0.3 percent in District 11, from 1.7 percent to 4.3 percent in District 12, and from 1.9 percent to 4.8 percent in District 16. Because of subsequent changes, the population deviations in these districts in the final map was -2.2 percent for District 8, 0.1 percent for District 11, 4.1 percent for District 12, and 3.3 percent for District 16. Therefore, the change in population deviation for each district that is both attributable to Commissioner McNulty's change order and that actually remained in the final map was an increase in deviation of 0.7 percent for District 8, a decrease in deviation of 1.6 percent for District 11, an increase of 2.4 percent for District 12, and an increase in deviation of 1.4 percent for District 16.

These changes increased the percentage of Hispanic population in District 8 from 25.9 percent in the draft map to 34.8 percent in the final map, with Hispanic voting-age population from 22.8 percent to 31.3 percent. The Commission ultimately concluded, however, that while District 8 came closer to constituting a minority ability-to-elect district than the previous District 23, it did not ensure minority voters the ability to elect candidates of their choice. The changes were nonetheless retained in the final map.

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The Commission approved the final legislative map on January 17, 2012, on a 3-2 vote, with the Republican commissioners voting against.

On February 28, 2012, the Commission submitted its plan to the Department of Justice for preclearance purposes. In its written submission, the Commission argued that the benchmark plan contained seven ability-to-elect districts, comprised of one Native American district and six Hispanic districts. The Commission argued that the new map was an improvement over the benchmark plan, as the new map contained ten districts (one Native American district and nine Hispanic districts) in which a minority group had the opportunity to elect the candidate of its choice. The Commission also noted that while District 8 was not an ability-to-elect district, its performance by that measure was improved over its predecessor, Benchmark District 23.

On April 26, the Department of Justice approved the Commission's map.

I. The Motivation for the Deviations

As noted previously and explained in more detail below, at 41-44, we conclude as a matter of law that the burden of proof is on plaintiffs. To prevail, plaintiffs must prove that the population deviations were not motivated by legitimate considerations or, possibly, if motivated in part by legitimate considerations, that illegitimate considerations predominated over legitimate

considerations.[7] We assume that seeking partisan advantage is not a legitimate consideration, and we conclude, as discussed at 44-49, that compliance with the Voting Rights Act is a legitimate consideration.

We find that plaintiffs have not satisfied their burden of proof. In particular, we find that the deviations in the ten districts submitted to the Department of Justice as minority ability-to-elect districts were predominantly a result of the Commission's good-faith efforts to achieve preclearance under the Voting Rights Act. Partisanship may have played some role, but the primary motivation was legitimate.

With respect to the deviations resulting from Commissioner McNulty's change to District 8 between the draft map and the final map, we find that partisanship clearly played some role. We also find, however, that legitimate motivations to achieve preclearance also played a role in the Commission's decision to enact the change to District 8.

We acknowledge that it is difficult to separate out different motivations in this context. That is particularly

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7. As discussed below, at 42-43 n. 10, we have not reached agreement on the legal standard to be applied. A majority of the court has concluded that plaintiffs have failed to demonstrate that illegitimate considerations predominated over legitimate ones. Necessarily, therefore, plaintiffs have not proven that illegitimate considerations were the actual and sole reasons for the population deviations. By either test adopted by the two judges that make up a majority of the court, plaintiffs have failed to carry their burden.

true in this instance because the cited motivations pulled in exactly the same direction. As a practical matter, changes that strengthened minority ability-to-elect districts were also changes that improved the prospects for electing Democratic candidates. Those motivations were not at cross purposes. They were entirely parallel.

The Cruz Index, used by the commissioners in considering changes to the map aimed at strengthening minority districts, illustrates the overlap of these two motivations. It applied results from an election contest between a Hispanic Democrat and a white, non-Hispanic (Anglo) Republican. The commissioners used votes for candidate Cruz to reflect a willingness to vote for a Hispanic candidate—which was itself a proxy for the ability of the Hispanic population to elect its preferred candidate, regardless of that candidate's ethnicity—but the voters could have been motivated, as much or even more, to vote for a Democrat. Similarly, voters who voted for Cruz's opponent may have been willing to vote for a Hispanic candidate but were actually motivated to vote for a Republican. In using the Cruz Index to adjust district boundaries in order to strengthen the minority population's ability to elect its preferred candidate, the commissioners used a measure that equally reflected the ability to elect a Democratic candidate.

The practical correlation between these two motivations was confirmed by the results of the 2012 election, conducted under the map that is the subject of this lawsuit. The legislators elected from districts identified by the Commission as minority ability-to-elect

districts were all Democrats. As noted above, 19 of the 30 legislators elected from those districts were Hispanic or Native American.

It is highly likely that the members of the Commission were aware of this correlation. Individuals sufficiently interested in government and politics to volunteer to serve on the Commission and to contribute hundreds of hours of time to the assignment would be aware of historic voting patterns. If they weren't aware before, then they would necessarily have become aware of the strong correlation between minority ability-to-elect districts and Democratic-leaning districts in the course of their work.

That knowledge could open the door to partisan motivations in both directions. If an individual member of the Commission were motivated to favor Democrats, that could have been accomplished under the guise of trying to strengthen minority ability-to-elect districts. Similarly, a member motivated to favor Republicans could have taken advantage of the process to concentrate minority population into certain districts in such a way as to leave a larger proportion of Republicans in the remaining districts.

Recognizing the difficulty of separating these two motivations, we find that the Commission was predominantly motivated by a legitimate consideration, in compliance with the Voting Rights Act.

All five of the commissioners, including the Republicans, put a priority on achieving preclearance from

the Department of Justice on the first try. To maximize the chances of achieving that goal, the Commission's counsel and consultants recommended creating ten minority ability-to-elect districts. There was not a partisan divide on the question of whether ten districts was an appropriate target.

After working to create ten such districts in the draft map, including Districts 24 and 26, all but Commissioner Stertz voted for the draft map. Commissioner Stertz's reason for voting against the draft map, however, was not that he objected to the population deviations resulting from the creation of the ability-to-elect districts. Rather, he felt that the Commission had not paid sufficient attention to the other criteria that the Arizona Constitution requires the Commission to consider, such as keeping communities of interest together.

In short, the bipartisan support for the changes leading to the population deviations in the draft map undermines the notion that partisanship, rather than compliance with the Voting Rights Act, was what motivated those deviations.

We also find that the additional population deviation in these ten districts resulting from changes occurring between the passage of the draft map and the final map were primarily the result of efforts to obtain preclearance, some reservations by the Republican commissioners notwithstanding. After the draft map was completed, both Republican commissioners expressed concern about further depopulating minority ability-to-elect districts.

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At the hearing in which the Commission began work on the final map, Commissioner Stertz said that it was his "understanding that the maps as they are currently drawn do meet [the Voting Rights Act] criteria," and that he didn't want to "overpack Republicans into Republican districts . all being done on the shoulders of strengthening [Voting Rights Districts]." Commissioner Freeman shared Commissioner Stertz's concerns.

But the Commission's counsel and consultants responded that there was uncertainty as to whether the map would preclear without strengthening those districts. And despite their initial reservations, the Republican commissioners did not vote against any of the change orders further strengthening the minority ability to elect in those districts. Commissioner Stertz even expressed support for these changes. In a public hearing that took place after the Commission made additional changes to the Voting Rights Act districts, Commissioner Stertz said that apart from a change order affecting Districts 8 and 11—which were not ability-to-elect districts and which we discuss next—he was "liking where the map has gone" and thought there was "a higher level of positive adjustments that have been made than the preponderance of the negative design of Districts 8 and 11." At trial, Commissioner Stertz testified that he relied on counsel's advice that ten benchmark districts were necessary, and that he thought those ten districts were "better today than when they were first developed in draft maps." The bipartisan support for the goal of preclearance, and the bipartisan support for the change orders strengthening these ten districts to meet that goal, support the finding that preclearance motivated the deviations.

We make this finding despite plaintiffs' contention that the selection of counsel and mapping consultant prove that Chairwoman Mathis was biased towards Democratic interests. We agree that giving Strategic Telemetry a perfect score is difficult to justify and reflects Mathis taking an ends-oriented approach to the process to select her preferred firm, Strategic Telemetry.

But even if Chairwoman Mathis preferred Strategic Telemetry for partisan reasons rather than the neutral reasons she expressed at the time, it would not prove that partisanship was the reason she supported the creation of ability-to-elect districts. As we have discussed, strong evidence shows that preclearing on the first attempt was a goal shared by all commissioners, not just Chairwoman Mathis.

With respect to the changes to District 8 occurring between the draft map and final map, the evidence shows that partisanship played some role. Though Commissioner McNulty first presented the possible changes to Districts 8 and 11 as an opportunity to make District 8 into a more competitive district, that simply meant making District 8 into a more Democratic district. Because Districts 8 and 11 both favored Republicans before the proposed change, any shift in population between the two districts to make one of them more "competitive" necessarily increased the chances that a Democrat would win in one of those districts. In fact, in a close senate race in the newly drawn District 8, the Democrat did win. We might view the issue differently had Commissioner McNulty proposed to create a series of competitive districts out

of both Democrat- and Republican-leaning districts, or applied some defined standards evenhandedly across the state. Instead, she sought to make one Republican-leaning district more amenable to Democratic interests. Moreover, the Commission was well aware of the partisan implications of the proposed change before adopting it. Both Republican commissioners made their opposition to the change, on the basis that it packed Republican voters into District 11 to aid Democratic prospects in District 8, known early on.

Nonetheless, while partisanship played a role in the increased population deviation associated with changing District 8, so too did the preclearance goal play a part in motivating the change. While Commissioner McNulty originally suggested altering Districts 8 and 11 for the sake of competitiveness, she subsequently suggested that District 8 could become an ability-to-elect district. Consultants and counsel endorsed this idea, in part because they had some doubts that District 26 would offer the ability to elect. It was not until after the consultants and counsel suggested pursuing these changes for the sake of preclearance that Chairwoman Mathis endorsed the idea. While the Commission ultimately concluded that it could not make a true ability-to-elect district out of District 8, the submission to the Department of Justice did cite the changes made to that district's boundaries in arguing that the plan deserved preclearance. Compliance with the Voting Rights Act was a substantial part of the motivation for the treatment of District 8.

Appendix B

III. Resolution of Pretrial Motions

The parties filed several motions prior to trial that this court disposed of summarily in its order dated February 22, 2013, with an opinion explaining the bases of the rulings to follow. Before we turn to our conclusions of law on the merits of the case, we explain our rulings on those motions.

A. First Motion for Judgment on the Pleadings

Defendants' first motion for judgment on the pleadings sought two forms of relief. First, defendants requested dismissal of the commissioners based on legislative immunity. Second, defendants requested dismissal of plaintiffs' state-law claim as barred by the Eleventh Amendment. We now explain why both forms of relief were granted.

1. Standard of Judgment on the Pleadings

Judgment on the pleadings is appropriate when there is "no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). In assessing defendants' motion, we "accept[ed] all factual allegations in the complaint as true and construe[d] them in the light most favorable to the non-moving party." *Id.*

2. The Commissioners Were Immune from Suit

It was not entirely clear from the complaint but plaintiffs' claims against the commissioners appeared to be based solely on the commissioners' official acts. That is, plaintiffs' claims rested on the commissioners' actions in connection with the adoption of a particular final legislative map. Plaintiffs' federal claim sought relief pursuant to 42 U.S.C. § 1983 based on their belief that the adoption of that map constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. The Commission argued legislative immunity forbade plaintiffs from pursuing this claim against the commissioners.

"The Supreme Court has long held that state and regional legislators are absolutely immune from liability under § 1983 for their legislative acts." *Kaahumanu v. Cnty. of Maui*, 315 F.3d 1215, 1219 (9th Cir. 2003). This immunity applies to suits for money damages as well as requests for injunctive relief. *See Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 734, 100 S. Ct. 1967, 64 L. Ed. 2d 641 (1980). Litigants often disagree over whether legislative immunity applies to a particular individual or to particular acts performed by an individual occupying a legislative office. *Kaahumanu*, 315 F.3d at 1219 (legislative immunity applies only to "legislative rather than administrative or executive" actions). But plaintiffs effectively conceded the commissioners qualified as legislators performing legislative acts. So instead of the normal lines of attack, plaintiffs argued that *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908),

prevented legislative immunity from requiring dismissal of the commissioners. Plaintiffs also claimed their request for attorneys' fees permitted them to maintain suit against the commissioners. Neither argument was convincing.

Ex parte Young creates a legal fiction to avoid suits against state officials from being barred by the Eleventh Amendment. *See, e.g., Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1189 (9th Cir. 2003) (per curiam) ("[T]he doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit ."). That fiction permits only "actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law." *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012). Plaintiffs did not cite any case where a court employed the fiction of *Ex parte Young* to avoid the otherwise applicable bar of legislative immunity. And existing case law reaches the opposite conclusion. *See, e.g., Scott v. Taylor*, 405 F.3d 1251, 1257 (11th Cir. 2005) (finding legislative immunity barred claim for prospective injunctive relief). Thus, *Ex parte Young* was not sufficient to overcome the bar of legislative immunity.

Even if the court had agreed *Ex parte Young* might permit the naming of the commissioners in certain circumstances, it was particularly inapt here. Pursuant to *Ex parte Young*, the "state official sued 'must have some connection with the enforcement of the act.'" *Coal. to Defend Affirmative Action*, 674 F.3d at 1134 (quoting *Ex parte Young*, 209 U.S. at 157). That connection must be "fairly direct" and a "generalized duty to enforce state law

or general supervisory power over the persons responsible for enforcing the challenged provision" is not sufficient. *Los Angeles County Bar Ass'n v. March Fong Eu*, 979 F.2d 697, 704 (9th Cir. 1992). Accordingly, *Ex parte Young* does not allow a plaintiff to sue a state official who cannot provide the relief the plaintiff actually seeks. *See id.*

Under Arizona's redistricting process, the commissioners have no direct connection to implementing the final legislative map nor do they have any supervisory power over those state officials implementing the final legislative map. Rather, it is the Secretary of State who enforces the map. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 211 Ariz. 337, 121 P.3d 843, 857 (Ariz. Ct. App. 2005) (per curiam) ("Once the Commission certifies the maps, the secretary of state must use them in conducting the next election."). Plaintiffs named the Secretary of State as a defendant and the Secretary of State conceded he is responsible for enforcing the map. In light of this, assuming *Ex parte Young* allows suit against the commissioners in some circumstances, the present suit did not qualify.

Finally, plaintiffs argued the commissioners' "presence [was] essential to maintaining section 1983 relief, which includes an award of attorneys' fees under 42 U.S.C. § 1988." In other words, plaintiffs wanted to keep the commissioners as defendants to ensure the possibility of plaintiffs recovering their attorneys' fees. Plaintiffs did not cite, and the court could not find, any authority permitting the issue of fees to determine the propriety of keeping certain defendants in a suit. Moreover, plaintiffs'

issue regarding fees was a problem of their own creation in that the Secretary of State undoubtedly was an appropriate defendant and plaintiffs could have sought fees from him. At oral argument, however, plaintiffs' counsel conceded the complaint did not seek an award of fees from the Secretary of State.[8] The fact that plaintiffs made a choice not to seek fees against one party from whom they could clearly obtain fees was not a sufficient basis to allow plaintiffs to continue this suit against inappropriate parties.

Neither *Ex parte Young* nor the impossibility of plaintiffs collecting fees from the remaining defendants justified keeping the commissioners as defendants. Therefore, the commissioners were entitled to judgment on the pleadings.

3. Plaintiff's State-Law Claim Was Barred by the Eleventh Amendment

In addition to their § 1983 claim, plaintiffs also asserted a state-law claim that the final legislative map "violates the equal population requirement of Ariz. Const. art. 4, pt. 2, §1(14)(B)." Defendants moved to dismiss this state-law claim as barred by the Eleventh Amendment pursuant to *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Plaintiffs did not dispute that a straightforward application of

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8. The portion of the complaint referenced during oral argument seeks fees "against the IRC only." In light of this language, it is unclear why plaintiffs believed they had requested fees from the individual commissioners.

Pennhurst established their state-law claim was barred by the Eleventh Amendment. Instead, plaintiffs argued defendants waived their Eleventh Amendment immunity. Plaintiffs were incorrect.

"For over a century now, [the Supreme Court] has consistently made clear that 'federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Sossamon v. Texas*, 131 S. Ct. 1651, 1657-58, 179 L. Ed. 2d 700 (2011) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)). A state may choose to waive its immunity, but the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id.* at 1658 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)). That test consists of determining whether "the state's conduct during the litigation clearly manifest[ed] acceptance of the federal court's jurisdiction or [was] otherwise incompatible with an assertion of Eleventh Amendment immunity." *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 759 (9th Cir. 1999). For example, the Ninth Circuit concluded waiver occurred when a state appeared, actively litigated a case, and waited until the first day of trial to claim immunity. *Id.* at 763. The situation in the present case was significantly different.

Plaintiffs filed their original complaint on April 27, 2012. The parties then engaged in protracted pre-answer maneuvers that ended on November 16, 2012,

when the court denied defendants' motion to dismiss. Approximately three weeks later, defendants filed their answer asserting Eleventh Amendment immunity as well as a formal motion seeking judgment on the pleadings based on that immunity. Thus, while the case had been pending for over nine months at the time immunity was first asserted, the vast majority of that time was consumed by briefing and deciding a motion to dismiss. There was no meaningful delay between issuance of the order on the motion to dismiss and defendants' assertion of the Eleventh Amendment. And while defendants might have raised immunity earlier, the actual sequence of events falls short of meeting the "stringent" test for establishing waiver. *Sossamon*, 131 S. Ct. at 1658. Therefore, defendants were entitled to judgment on the pleadings regarding plaintiffs' state-law claim.

B. Motion for Abstention

Citing *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), defendants moved to stay this case and defer hearing plaintiffs' federal claim until plaintiffs obtained resolution of state-law issues in state court or, in the alternative, to certify any state-law questions to the Arizona Supreme Court. A majority of the court summarily denied the motion, with Judge Silver dissenting.

Because "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims," *Pullman* abstention is

available only in narrowly limited, special circumstances. *Zwickler v. Koota*, 389 U.S. 241, 248, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967). At its core, it "reflect[s] a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Pullman*, 312 U.S. at 501. "It is better practice, in a case raising a federal constitutional or statutory claim, to retain jurisdiction, rather than to dismiss." *Zwickler*, 389 U.S. at 244 n.4. *Pullman* abstention generally is appropriate only if three conditions are met: (1) the complaint "requires resolution of a sensitive question of federal constitutional law; (2) the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues; and (3) the possibly determinative issue of state law is unclear." *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 888-89 (9th Cir. 2011) (quoting *Spoklie v. Mont*, 411 F.3d 1051, 1055 (9th Cir. 2005)). Proper application of these conditions is meant to ensure federal courts defer "to state court interpretations of state law" while avoiding "'premature constitutional adjudication' that would arise from 'interpreting state law without the benefit of an authoritative construction by state courts.'" *Id.* (quoting *Gilbertson v. Albright*, 381 F.3d 965, 971 n.6 (9th Cir. 2004) (en banc)) (internal quotation marks omitted).

When deciding whether to exercise its discretionary equity powers to abstain, a court also must consider that "abstention operates to require piecemeal adjudication in many courts," possibly "delaying ultimate adjudication on

the merits for an undue length of time." *Baggett v. Bullitt*, 377 U.S. 360, 378-79, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964). That delay can work substantial injustice because forcing "the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler*, 389 U.S. at 252.

Delay caused by abstention is especially problematic in voting rights cases. *Harman v. Forssenius*, 380 U.S. 528, 537, 85 S. Ct. 1177, 14 L. Ed. 2d 50 (1965). The Ninth Circuit noted in a redistricting case that due to the "special dangers of delay, courts have been reluctant to rely solely on traditional abstention principles in voting cases." *Badham v. U.S. Dist. Court for the N. Dist. of Cal.*, 721 F.2d 1170, 1173 (9th Cir. 1983). Expressing specific concern about the possibility of a potentially defective redistricting plan being left in place for an additional election cycle, it held that "before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote." *Id.*

Given the importance of prompt adjudication of voting rights disputes, we exercised our discretion and decided not to abstain. The three conditions precedent to applying *Pullman* abstention identified above might have been present here, but we concluded that we should deny the motion without having to make that determination because of the likely delay that would have resulted.

If we abstained as defendants requested, it was not likely that a resolution could be reached in time to put a new plan in place, if necessary, for the 2014 election cycle. Not only are voting rights disputes particularly important, they are also particularly complex. The last round of litigation over redistricting in Arizona, concerning Arizona's legislative redistricting maps following the 2000 census, commenced in March 2002. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 208 P.3d 676, 682 (Ariz. 2009) (en banc). The state trial court did not issue its decision until January 2004, twenty-two months later. *See id.* The appellate process did not conclude until the Arizona Supreme Court's final decision in May 2009. *Id.* at 676. The Commission's motion for abstention came before us in December 2012. At the time of our decision on the motion, in February 2013, no state court action was pending. Thus, deferring ruling on the federal claim would have delayed adjudication on the merits until a state court action was initiated and concluded, which likely would have precluded relief in time for the 2014 election cycle.[9]

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9. This case commenced in April 2012. We set a schedule with the intent that our decision would be filed in time for the 2014 election cycle, even leaving time for review by the Supreme Court. That is why trial was scheduled and held in March 2013, even though the parties requested a later trial date. The subsequent filing by the Supreme Court in June 2013 of its decision in *Shelby County v. Holder*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013), put that goal in jeopardy. The parties were subsequently ordered to brief the impact of *Shelby County* and, as illustrated by the dialogue between this opinion and the dissenting opinion, it has taken us some time to determine that impact. When we denied the motion for abstention, however, we did not know that *Shelby*

Furthermore, we could not resolve the state-law issues as this case no longer included the state-law claim because the State of Arizona's Eleventh Amendment immunity under *Pennhurst* precluded relief on that claim in federal court. And, it was also unclear whether any state law issues were implicated in plaintiffs' remaining federal claim. In sum, this case is unlike the typical case warranting *Pullman* abstention, where the federal court will necessarily construe a state statute that the state courts themselves have not yet construed in order to decide the sensitive question of whether the state statute violates the federal Constitution. *See, e.g., Potrero Hills Landfill*, 657 F.3d at 889. Here, by contrast, we did not need to resolve any question of state law as a predicate to deciding the merits of the federal claim. Therefore, we concluded that the special circumstances necessary for exercising discretion to defer ruling on plaintiffs' federal claim did not exist.

County was coming. The denial of the motion for abstention was based on our belief that we would reach a conclusion in time for the 2014 election cycle and that it would be highly unlikely that a similarly timely result could be achieved if we abstained in favor of state court adjudication.

We note that even with the unanticipated delay to consider the impact of *Shelby County*, our decision is filed about twenty-four months after the commencement of this action, about on par with the twenty-two months that it took the Arizona trial court to resolve the challenge to the legislative redistricting maps drawn following the 2000 census. We remain of the view that abstaining in favor of state court litigation, which would likely have entailed an appeal following a state trial court decision, would have taken even more time.

As an alternative to their request for abstention, defendants requested the court certify any state-law questions to the Arizona Supreme Court. A basic prerequisite for a court to certify a question to the Arizona Supreme Court is the existence of a pending issue of Arizona law not addressed by relevant Arizona authorities. *See, e.g., Seltzer v. Paul Revere Life Ins. Co.*, 688 F.3d 966, 968 (9th Cir. 2012). In addition, Arizona's certification statute requires the presence of a state-law question that "may be determinative" of the case. A.R.S. § 12-1861. With the dismissal of plaintiffs' state-law claim, there was no pending issue of Arizona law in this case. Therefore, the request in the alternative for certification also was denied.

C. Motion for Protective Order

Prior to discovery, the Commission moved for a protective order on the basis of legislative privilege. The Commission requested that the panel prohibit the depositions of the commissioners, their staff, and their consultants, as well as limit the scope of documents and interrogatories during discovery. We ordered the commissioners, at the time defendants in this case, to inform the court through counsel whether they would exercise legislative privilege if asked questions covered by the privilege. Commissioners Mathis, Herrera, and McNulty informed the court that they would invoke legislative privilege, while Commissioners Freeman and Stertz indicated they would waive it. We later denied the motion for a protective order, and we now explain the basis for doing so.

Appendix B

Whether members of an independent redistricting commission can withhold relevant evidence or refuse to be deposed on the basis of legislative privilege is an issue of first impression. Neither the Ninth Circuit nor, as far as we can tell, any other court has decided whether members of an independent redistricting commission can assert legislative privilege in a challenge to the redistricting plan they produced. In the present litigation, we conclude that members of the Arizona Independent Redistricting Commission cannot assert a legislative evidentiary privilege.

State legislators do not have an absolute right to refuse deposition or discovery requests in connection with their legislative acts. In *United States v. Gillock*, 445 U.S. 360, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980), the Supreme Court held that a state senator could not bar the introduction of evidence of his legislative acts in a federal criminal prosecution. Although Gillock could have claimed protection under the federal Speech or Debate Clause had he been a Member of Congress, the Court refused "to recognize an evidentiary privilege similar in scope to the Federal Speech or Debate Clause" for state legislators. *Id.* at 366. The Court reasoned that "although principles of comity command careful consideration, where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." *Id.* at 373. The Court in *Gillock* held that no legislative privilege exists in federal criminal prosecutions. It did not opine on the existence or extent of legislative privilege for state legislators in the civil context.

Appendix B

The Ninth Circuit has recognized that state legislators and their aides may be protected by a legislative privilege. *See Jeff D. v. Otter*, 643 F.3d 278, 289-90 (9th Cir. 2011). That case did not consider legislative privilege in the redistricting context, however, let alone whether citizen commissioners could assert the privilege. Moreover, its discussion of legislative privilege was limited. The decision did not indicate whether state legislators might assert an absolute legislative privilege in all civil litigation, or whether any privilege state legislators held must yield when significant competing interests exist.

Whether or not state legislators might be able to assert in federal court an absolute legislative privilege in some circumstances, we do not think that the citizen commissioners here hold an absolute privilege. The Fourth Circuit has recognized, albeit not specifically in any redistricting cases, a seemingly absolute privilege against compulsory evidentiary process for state legislators and other officials acting in a legislative capacity. *See EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 180-81 (4th Cir. 2011). The purposes underlying an absolute privilege for state legislators are that it "allows them to focus on their public duties by removing the costs and distractions attending lawsuits [and] shields them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *Id.* at 181. However, these are not persuasive reasons for extending the privilege to appointed citizen commissioners. Unlike legislators, the commissioners have no other public duties from which to be distracted. *See* Ariz. Const. art. IV, pt. 2, §§ 1(3), (13)

(providing that commissioners cannot hold elected office during or for the three years following their service on the Commission). They cannot be defeated at the ballot box because they don't stand for election. Indeed, the process is not supposed to be governed by what happens at the ballot box. The reason why Arizona transferred redistricting responsibilities from the legislature to the Commission was to separate the redistricting process from politics. *See* Ariz. Proposition 106 (2000), *available at* http://www.azsos.gov/election/2000/info /pubpamphlet/prop2-C-2000.htm (on the ballot title of the initiative creating the Commission, stating one purpose behind the law as "ending the practice of gerrymandering").

In addition, to the extent comity is a rationale underlying legislative privilege, the Supreme Court has held that comity can be trumped by "important federal interests." *Gillock*, 445 U.S. at 373. The federal government has a strong interest in securing the equal protection of voting rights guaranteed by the Constitution, an interest that can require the comity interests underlying legislative privilege to yield. *Cf. Badham*, 721 F.2d at 1173 (observing that federal courts are more reluctant to abstain in voting rights cases and noting that the "right to vote is fundamental because it is preservative of all rights" (internal quotations marks and alterations omitted)).

For similar reasons, we also refuse to extend a qualified legislative privilege to the commissioners in this case. Some courts have recognized a qualified privilege for state legislators in redistricting cases, in which a

balancing test determines whether particular evidence is barred by the privilege. *See, e.g., Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003). These cases did not involve an independent redistricting commission, however, and several of these cases even suggested that a legislative privilege would not apply to citizen commissioners. *See Favors v. Cuomo*, 285 F.R.D. 187, 220 (E.D.N.Y. 2012) (concluding that permitting discovery would have minimal chilling effect on future legislative redistricting deliberations because New York had recently passed a law creating an independent redistricting commission composed of non-legislators); *Rodriguez*, 280 F. Supp. 2d at 101 (distinguishing between discovery requests aimed at the legislature itself and those aimed at an advisory redistricting commission composed of legislators and non-legislators, because the latter was "more akin to a conversation between legislators and knowledgeable outsiders"); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 301 n.19, 304-05 (D. Md. 1992) (holding that legislators were protected by the privilege, but not citizens serving on a redistricting advisory committee).

In determining whether a qualified privilege applies to state legislators, the courts that recognize a qualified privilege often balance the following factors: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will

be forced to recognize that their secrets are violable." *Rodriguez*, 280 F. Supp. 2d at 101. These factors weigh heavily against recognizing a privilege for members of an independent redistricting commission. Because what motivated the Commission to deviate from equal district populations is at the heart of this litigation, evidence bearing on what justifies these deviations is highly relevant. In the event that plaintiffs' claims have merit, and that the commissioners were motivated by an impermissible purpose, the commissioners would likely have kept out of the public record evidence making that purpose apparent. *See Cano v. Davis*, 193 F. Supp. 2d 1177, 1181-82 (C.D. Cal. 2002) (Reinhardt, J., concurring in part and dissenting in part) ("Motive is often most easily discovered by examining the unguarded acts and statements of those who would otherwise attempt to conceal evidence of discriminatory intent."). The federal interest in protecting voting rights is a serious one, as discussed earlier, and can require comity concerns to yield.

Perhaps most importantly, the nature and purpose of the Commission undermines the claim that allowing discovery will chill future deliberations by the Commission or deter future commissioners from serving. *See Favors*, 285 F.R.D. at 220. The commissioners will not be distracted from other duties because they have no other duties, and their future actions will not be inhibited because they have no future responsibility. *See* Ariz. Const. art. IV, pt. 2, §§ 1(3), (13). And, as the majority in *Marylanders* observed: "We . deem it extremely unlikely that in the future private citizens would refuse to serve on a prestigious

gubernatorial committee because of a concern that they might subsequently be deposed in connection with actions taken by the committee." 144 F.R.D. at 305 n.23.

The parties dispute the relevance of some of plaintiffs' requested discovery. But to the extent that plaintiffs have requested information not relevant to the central disputes in this litigation, the Commission need not rely on legislative privilege for protection. As stated in our order dated February 22, 2013, the court will not permit "discovery that is not central to the federal claims or any other inappropriate burden under Federal Rule of Civil Procedure 26(c)."

In conclusion, the rationale supporting the legislative privilege does not support extending it to the members of the Arizona Independent Redistricting Commission in this case.

IV. Conclusions of Law

A. Burden of Proof

The Equal Protection Clause of the Fourteenth Amendment requires that state legislative districts "must be apportioned on a population basis," meaning that the state must "make an honest and good faith effort to construct districts as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Some deviation in the population of legislative districts is constitutionally permissible, so long as the disparities are based on

"legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 579. Compactness, contiguity, respecting lines of political subdivisions, preserving the core of prior districts, and avoiding contests between incumbents are examples of the legitimate criteria that can justify minor population deviations, so long as these criteria are "nondiscriminatory" and "consistently applied." *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983).

Before requiring the state to justify its deviations, plaintiffs must make a prima facie case of a one-person, one-vote violation. By itself, the existence of minor deviations is insufficient to make out a prima facie case of discrimination. *Brown v. Thomson*, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983). With respect to state legislative districts, the Supreme Court has said that, as a general matter, a "plan with a maximum population deviation under 10% falls within this category of minor deviations." *Id.* at 842. Although courts rarely strike down plans with a maximum deviation of less than ten percent, a maximum deviation below ten percent does not insulate the state from liability, but instead merely keeps the burden of proof on the plaintiff. *See Cox v. Larios*, 542 U.S. 947, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004) (summarily affirming the invalidation of a plan with a 9.98 percent maximum population deviation).

Because the maximum deviation here is below ten percent, the burden is on plaintiffs to prove that the deviations did not result from the effectuation of legitimate redistricting policies. The primary way in

which plaintiffs seek to carry their burden is by showing that the Commission deviated from perfect population equality out of a desire to increase the electoral prospects of Democrats at the expense of Republicans. Plaintiffs argue that partisanship is not a legitimate redistricting policy that can justify population deviations.

The Supreme Court has not decided whether or not political gain is a legitimate state redistricting tool. *See Cox*, 542 U.S. at 951 (Scalia, J., dissenting) (noting that the Court has not addressed whether a redistricting plan with a maximum deviation under ten percent "may nevertheless be invalidated on the basis of circumstantial evidence of partisan political motivation"). Because we conclude that the redistricting plan here does not violate the Fourteenth Amendment whether or not partisanship is a legitimate redistricting policy, we need not resolve the question. For the purposes of this opinion, we assume, without deciding, that partisanship is not a valid justification for departing from perfect population equality.

Even assuming that small deviations motivated by partisanship might offend the Equal Protection Clause, plaintiffs will not necessarily sustain their burden simply by showing that partisanship played some role. The Supreme Court has not specifically addressed what a plaintiff must prove in a one-person, one-vote challenge when population deviations result from mixed motives, some legitimate and some illegitimate.

This panel has not reached a consensus on what the standard should be.[10] We conclude, for purposes of this

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10. As expressed in her separate concurring opinion, at 9-11, Judge Silver concludes that plaintiffs must show that the "actual and sole reason" for the challenged population deviation was improper. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 366 (S.D.N.Y. 2004) (holding that plaintiffs must show that the "deviation results *solely* from an unconstitutional or irrational state purpose" (emphasis added)).

Judge Clifton is not persuaded that the bar ought to be set that high. Some Supreme Court authority suggests that plaintiffs must show that illegitimate criteria at least predominated over legitimate considerations. For example, while government programs that draw classifications on the basis of race are typically subject to strict scrutiny, redistricting plans challenged for racial gerrymandering are not subject to strict scrutiny "if race-neutral, traditional districting considerations predominated over racial ones." *Bush v. Vera*, 517 U.S. 952, 964, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (plurality opinion). Requiring a showing that illegitimate criteria predominated over legitimate criteria appears appropriate to him in light of the deference courts afford states in constructing their legislative districts and because multiple motives will frequently arise in any deliberative body. *Cf. Miller v. Johnson*, 515 U.S. 900, 915-16, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) (noting that courts must be "sensitive to the complex interplay of forces that enter a legislature's redistricting calculus" and afford states the "discretion to exercise the political judgment necessary to balance competing interests").

Judge Wake, as discussed in his separate opinion, at 24-25, concludes that both the "only motive" and the "predominant motive" standards are unsatisfactory.

For decision purposes, a majority of the panel, made up of Judge Clifton and Judge Silver, have concluded that plaintiffs have

decision, that plaintiffs must, at a minimum, demonstrate that illegitimate criteria predominated over legitimate criteria.

Finally, we reject plaintiffs' argument that strict scrutiny applies to the extent that the Commission claims that racial motivations drove the deviations from population equality. All of the cases cited in support of this argument involve racial gerrymandering claims. *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997). As plaintiffs concede, this is not a racial gerrymandering case. Nor have plaintiffs specifically articulated how, in the absence of a claim of racial discrimination, strict scrutiny helps their case. Suppose that, applying strict scrutiny, we concluded that the Commission employed race as a redistricting factor in a manner not narrowly tailored to advance a compelling governmental interest. That may establish a racial gerrymandering violation, but it would not establish a one-person, one-vote violation. We decline to reduce plaintiffs' burden by importing strict scrutiny into the one-person, one-vote context, a context in which the Supreme Court has made clear we owe state legislators substantial deference. *See Gaffney v. Cummings*, 412 U.S. 735, 749, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973).

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not demonstrated that partisanship predominated over legitimate redistricting considerations, applying the lower standard favored by Judge Clifton. Though Judge Silver concludes that the standard should be higher, if the predominance standard is not met, the "actual and sole reason" standard cannot be met. For discussion purposes, therefore, this per curiam opinion will speak in terms of the predominance standard.

In sum, plaintiffs must prove that the deviations were not motivated by legitimate considerations or, if motivated in part by legitimate considerations, that illegitimate considerations predominated over legitimate considerations. Because we have found that the deviations in the Commission's plan were largely motivated by efforts to gain preclearance under the Voting Rights Act, we turn next to whether compliance with Section 5 of the Voting Rights Act is a permissible justification for minor population deviations.

B. Compliance with the Voting Rights Act as a Legitimate Redistricting Policy

The Supreme Court has not specifically spoken to whether compliance with the Voting Rights Act is a redistricting policy that can justify minor population deviations. The Court has not provided an exhaustive list of permissible criteria. Among the legitimate criteria it has approved are compactness, contiguity, respecting municipal lines, preserving the cores of prior districts, and avoiding contests between incumbents. *Karcher*, 462 U.S. at 740. In the context of racial gerrymandering cases, the Court has assumed, without deciding, that the Voting Rights Act is a compelling state interest. *Vera*, 517 U.S. at 977 (plurality opinion).

We conclude that compliance with the Voting Rights Act is among the legitimate redistricting criteria that can justify minor population deviations. If compliance with the Voting Rights Act is not a legitimate, rational state policy on par with compactness and contiguity, we doubt that the

Court would have assumed in *Vera* that it is a compelling state interest. Neither plaintiffs nor the dissenting opinion have offered a sensible explanation.

More importantly, we fail to see how compliance with a federal law concerning voting rights—compliance which is mandatory for a redistricting plan to take effect—cannot justify minor population deviations when, for example, protecting incumbent legislators can. This is, perhaps, our primary disagreement with the dissenting opinion. It too narrowly defines the reasons that may properly be relied upon by a state to draw state legislative districts with wider variations in population.

The dissenting opinion correctly notes, at 19-20, that states are required to establish congressional districts of essentially equal population. It acknowledges, as it must, that state legislative districts are not subject to as strict a standard. A state legislative plan may include some variation in district population in pursuit of legitimate interests.

The dissenting opinion also acknowledges, at 17 & 23, that obtaining preclearance under the Voting Rights Act was a legitimate objective in redistricting. But it contends that pursuit of that objective could not justify even minor variations in population among districts. In practical terms, the dissenting opinion would apparently permit the Commission to consider the preclearance objective only in drawing lines dividing districts of equal sizes.

The Supreme Court has made it clear, however, that states have greater latitude when it comes to state legislative districts. The Equal Protection Clause does not require exact equality. In drawing lines for state legislative districts, "[a]ny number of consistently applied legislative policies might justify some variance." *Karcher*, 462 U.S. at 740. Obtaining preclearance under the Voting Rights Act appears to us to be as legitimate a reason as other policies that have been recognized, such as avoiding contests between incumbents and respecting municipal lines.

Plaintiffs and the dissenting opinion, at 19, attempt to reframe the inquiry, arguing that the text of the Voting Rights Act itself does not specifically authorize population deviations. That is correct; there is no specific authorization for population deviations in the text of the legislation. But neither is there specific, textual authorization for population deviations in any of the other legitimate, often uncodified legislative policies that the Supreme Court has held can justify population deviations. For example, the Supreme Court's conclusion that compactness can justify population deviations does not turn on the existence of a Compactness Act that specifically authorizes population deviations for the sake of compact districts. The question is not whether the Voting Rights Act specifically authorizes population deviations, but whether seeking preclearance under the Voting Rights Act is a legitimate, rational state goal in the redistricting process. We are satisfied that it is.

The dissenting opinion, at 19, goes a step further and argues that the Voting Rights Act itself prohibits any

deviation in exact population equality for the purpose of complying with the Voting Rights Act. No court has so held, and we note that plaintiffs themselves have alleged that the Arizona redistricting plan violates the Equal Protection Clause, not that it violates the Voting Rights Act. We do not read the Act in the same way that the dissenting opinion does.[11]

Plaintiffs also argue that the Department of Justice does not purport to be able to force jurisdictions to depopulate districts to comply with Section 5. In a document entitled "Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act," the Department advises: "Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). But the Guidance goes on to make clear that, in the Department's view, Section 5 might in some cases require minor population deviations in state legislative plans. When a jurisdiction asserts that it cannot avoid retrogression because of population shifts, the

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11. Similarly, the dissenting opinion contends, at 20, that the Department of Justice "has never required unequal population for preclearance in the 48 years of administering Section 5." That assertion is not proven. More importantly, it is an irrelevant straw man. For preclearance purposes, any variation in population is a means, not an end. There would never be reason for the Department to "require[] unequal population." That is not the Department's goal. The question is whether a state might improve its chances of obtaining preclearance by presenting a plan that includes minor population variations. The evidence presented to us supported that proposition, and neither plaintiffs nor the dissenting opinion deny that fact.

Department looks to see whether there are reasonable, less retrogressive alternatives, as the existence of these alternatives could disprove the jurisdiction's assertion that retrogression is unavoidable. For state legislative redistricting, "a plan that would require *significantly* greater overall population deviations is not considered a reasonable alternative." *Id.* (emphasis added). The implication is that the Department would consider a plan with slightly greater population deviation to be a reasonable plan that would avoid retrogression—in other words, the Department might hold a state in violation of Section 5 if it could have avoided retrogression with the aid of minor population deviations. To be clear, we do not base our understanding of the law upon the Department's interpretation, but plaintiffs have cited the Department's Guidance as supporting its position, and we do not agree. In our view, the Department's Guidance expresses a conclusion that avoiding retrogression can justify minor population deviations. That is our conclusion, as well, based on our own view of the law, separate and apart from the Department's position.

This conclusion is not altered by the Supreme Court's recent decision in *Shelby County v. Holder*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013), which was decided after the legislative map in question here was drawn and implemented.[12] In *Shelby County*, the Court held that Section 4(b) of the Voting Rights Act, which contained the formula determining which states were subject to

12. As noted above, the decision was announced after the trial of this case. We ordered and obtained supplemental briefing from the parties on the impact of the decision on this case.

the preclearance requirement, was unconstitutional. *Id.* at 2631. The Court did not hold that the preclearance requirement of Section 5 was unconstitutional, but its ruling rendered the preclearance requirement inapplicable to previously covered jurisdictions, at least until Congress enacts a new coverage formula that passes constitutional muster. *See id.*

Plaintiffs and the dissenting opinion, at 15-17, argue that this ruling applies retroactively to this case, such that the Commission was not required to obtain preclearance for the legislative map at issue, thereby nullifying the pursuit of preclearance as a justification for population deviations. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993) (requiring that a rule of federal law announced by the Court and applied to the parties in that controversy "be given full retroactive effect by all courts adjudicating federal law").

But that approach reads too much into *Shelby County*. The Court did not hold that Section 5 of the Voting Rights Act, the section that sets out the preclearance process, was unconstitutional. The Court's opinion stated explicitly to the contrary: "We issue no holding on § 5 itself, only on the coverage formula." *Shelby Cnty.*, 133 S. Ct. at 2631. The Court did not hold that Arizona or any other jurisdiction could not be required to comply with the preclearance process, if a proper formula was in place for determining which jurisdictions are properly subject to the preclearance process. To the contrary, the Court's opinion expressly faulted Congress for not updating the coverage formula, implying that a properly updated

coverage formula that "speaks to current conditions" would withstand challenge. *Id.*

If we had before us a challenge to the coverage formula set forth in Section 4 of the Voting Rights Act, we would unquestionably be expected to apply *Shelby County* "retroactively," and we would do so. That is, however, not the issue before us. Neither is the issue before us whether the legislative map violated or complied with the Voting Rights Act.

Rather, the issue is whether the Commission was motivated by compliance with that law in deviating from the ideal population. In other contexts, where the issue is not whether the actions of public officials actually complied with the law but instead whether they might have reasonably thought to have been in compliance, we do not expect those public officials to predict the future course of legal developments.

For example, in the qualified immunity context, the issue is whether the actions of public officials "could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). There, we assess their actions based on law "clearly established" at the time their actions were taken. *Id.* at 639. Similarly, in the Fourth Amendment context, we decline to apply the exclusionary rule when a police officer conducts a search in reasonable reliance on a later invalidated statute. *Illinois v. Krull*, 480 U.S. 340, 348-49, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987). We

generally decline to require the officer to predict whether the statute will later be held unconstitutional, unless the statute is so clearly unconstitutional that a reasonable officer would have known so at the time. *Id.* at 355; *see also Davis v. United States*, 131 S. Ct. 2419, 2431-32, 180 L. Ed. 2d 285 (2011) (noting that even though a new Fourth Amendment rule applies retroactively, "the exclusion of evidence does not automatically follow" because of the good-faith exception).

Arizona was not the only state that drew new district lines following the 2010 census. The other states and jurisdictions subject to preclearance under the Voting Rights Act engaged in the same exercise. Nothing in *Shelby County* suggests that all those maps are now invalid, and we are aware of no court that has reached such a conclusion, despite the concern expressed in the dissenting opinion, at 15, that leaving the maps in place "would give continuing force to Section 5." To repeat, *Shelby County* did not hold Section 5 to be unconstitutional. Neither did it hold that any effort by a state to comply with Section 5 was improper.

In redistricting, we should expect states to comply with federal voting rights law as it stands at the time rather than attempt to predict future legal developments and selectively comply with voting rights law in accordance with their predictions. Accordingly, so long as the Commission was motivated by the requirements of the Voting Rights Act as it reasonably understood them at the time, compliance with the Voting Rights Act served as a legitimate justification for minor population deviations.

Appendix B

C. Application to 2012 Legislative Map

Plaintiffs argue that Districts 8, 24, and 26 could not have been motivated by compliance with the Voting Rights Act. They argue that only eight ability-to-elect districts existed in the benchmark plan. Because the Commission had created eight ability-to-elect districts even without Districts 8, 24, and 26, and avoiding retrogression only requires creating as many ability-to-elect districts as are in the benchmark plan, plaintiffs argue that the Voting Rights Act could not have motivated the creation of these three districts. In essence, plaintiffs urge us to determine how many ability-to-elect districts were strictly necessary to gain preclearance and to hold that deviations from the creation of purported ability-to-elect districts above that number cannot be justified by Voting Rights Act compliance.

This argument runs into several problems. First of all, plaintiffs have not given the court a basis to independently determine that there existed only eight ability-to-elect districts in the benchmark plan. Plaintiffs point to the fact that the Commission argued that there were eight benchmark districts in its submission to the Department of Justice. But the submission to the Department was an advocacy document. The Commission was motivated to make the strongest case for preclearance by arguing for a low number of benchmark ability-to-elect districts and a high number of new ability-to-elect districts. The Commission's consultants and counsel, in public meetings, had advised the Commission that their analysis suggested the existence of ten benchmark districts. The discrepancy

between the advice given in meetings and the arguments put forth in the submission to the Department of Justice is not a sufficient basis for the court to conclude that there were only eight ability-to-elect districts in the benchmark plan. Moreover, while plaintiffs criticize elements of the functional analysis performed by the Commission's consultants, plaintiffs have not provided the court with any functional analysis of their own or from any other source showing which districts provided minorities with the ability to elect in either the benchmark plan or the current plan that they challenge. In short, even if we were inclined to independently determine how many ability-to-elect districts existed in the benchmark plan, plaintiffs have not carried their burden to show that there were only eight.

In any event, we need not determine whether the minor population deviations were strictly necessary to gain preclearance. Plaintiffs presented testimony from an expert witness, Thomas Hofeller, to demonstrate that a plan could have been drawn with smaller population deviations. Dr. Hofeller prepared such a map, but he acknowledged that he had not taken other state interests into account, including interests clearly identified as legitimate, nor had he performed a racial polarization or functional analysis, so that map did not necessarily present a practical alternative. Because he concluded, contrary to the Commission and its counsel and consultants, that the benchmark number for minority ability-to-elect districts in the prior plan was only eight (seven Hispanic districts and one Native American district), his belief that his alternative map would have been precleared by

the Justice Department was disputed. More importantly, evidence that a map could have been drawn with smaller population deviations does not prove that illegitimate criteria motivated the deviations. *See Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1035 (D. Md. 1994).

Rather, it is enough that the minor population deviations are "based on legitimate considerations." *Reynolds v. Sims*, 377 U.S. 533, 579, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). In other words, we will invalidate the plan only if the evidence demonstrates that the deviations were not the result of reasonable, good-faith efforts to comply with the Voting Rights Act. We will not invalidate the plan simply because the Commission might have been able to adopt a map that would have precleared with less population deviation if we determine that in adopting its map the Commission was genuinely motivated by compliance with the Voting Rights Act.

This approach is in accord both with the deference federal courts afford to states in creating their own legislative districts and the realities of the preclearance process. The Department of Justice does not inform jurisdictions of the number of districts necessary for preclearance ahead of time. Nor could the Commission be certain which districts in any tentative plan would be recognized by the Department as having an ability to elect. These determinations are complex and not subject to mathematical certainty. For us to determine the minimum number of ability-to-elect districts necessary to comply with the Voting Rights Act and then to strike down a plan

if minor population deviations resulted from efforts that we concluded were not strictly necessary for compliance would create a very narrow target for the state. It would also deprive states of the flexibility to which the Supreme Court's one-person, one-vote jurisprudence entitles them in legislative redistricting. *See Gaffney v. Cummings*, 412 U.S. 735, 749, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973) ("Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts").

That deviations from perfect population equality in this case resulted in substantial part because of the Commission's pursuit of preclearance is evidenced both by its deliberations and by advice given to the Commission by its counsel and consultants. Plaintiffs cite *Larios v. Cox* for the proposition that advice of counsel is not a defense to constitutional infirmities in a redistricting plan. 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004). In *Larios*, state legislators mistakenly believed that any plan with a maximum deviation below ten percent was immune from a one-person, one-vote challenge and then created a plan with a maximum deviation of 9.98 percent deviations in the pursuit of illegitimate objectives. *See id.* at 1328. In holding that the plan violated the one-person, one-vote principle, the court held that reliance on faulty legal advice did not remedy the constitutional infirmity in the plan. *Id.* at 1352 n.16. But in *Larios*, there was no question that the legislature had pursued illegitimate policies.

The legislature had taken counsel's advice to mean that it did not need to have legitimate reasons for deviating. The court held that they did need legitimate reasons for deviating, and the Supreme Court affirmed.

Here, by contrast, what motivated the Commission is at issue. Counsel's advice does not insulate the Commission from liability, but it is probative of the Commission's intent. That is not to say that reliance on the advice of counsel will in all cases demonstrate the good-faith pursuit of a legitimate objective. The advice might be so unreasonable that the Commission could not reasonably have believed it, or other evidence may show that the Commission was not acting pursuant to the advice. But the Commission's attorneys gave reasonable advice as to how to pursue what they identified as a legitimate objective, and the Commission appeared to act in accordance with that advice. That is strong evidence that the Commission's actions were indeed in the pursuit of that objective, one that we have concluded for ourselves was legitimate.

With respect to the ten districts presented to the Department of Justice as ability-to-elect districts, including Districts 24 and 26, the evidence before us shows that the population deviations were predominantly based on legitimate considerations. The Commission was advised by its consultants and counsel that it needed to create at least ten districts. Given the uncertainty in determining the number of districts, and that one of the Commission's highest priorities was to preclear the first time, the Commission was not unreasonable in acting pursuant to this advice. As noted in our findings of fact, the target

of ten districts was not controversial and had bipartisan support. All commissioners, including the Republican appointees, believed that ten districts were appropriate.

A somewhat closer question is presented by the changes to the district boundaries, including Districts 24 and 26, made between the draft map and the final map. The draft racial polarization analysis prepared by King and Strasma indicated that minorities would be able to elect candidates of their choice in all ten proposed ability-to-elect districts in the draft map. Plaintiffs argue that no further changes could be justified by the Commission's desire to obtain preclearance because the draft map met that goal. The preclearance decision was not going to be made by King and Strasma, however, and the Commission could not be sure what it would take to satisfy the Department of Justice. The Commission was advised to try to strengthen the minority ability-to-elect districts even further, and it was not unreasonable under the circumstances for the Commission to undertake that effort. With regard to the ten ability-to-elect districts, we conclude that plaintiffs have not carried their burden of demonstrating that no legitimate motive caused the deviations or that partisanship predominated. Creation of these districts was primarily a consequence of the Commission's good-faith efforts to comply with the Voting Rights Act and to obtain preclearance.

District 8 presents an even closer question, because the evidence clearly shows that partisanship played some role in its creation. Commissioner McNulty presented the possible change to Districts 8 and 11 as an opportunity

to make District 8 into a more competitive district. We do not doubt that the creation of competitive districts is a rational, legitimate state interest. But to justify population deviations, legitimate state criteria must be "nondiscriminatory" and "consistently applied." *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983). Commissioner McNulty's competitiveness proposal was neither applied consistently nor in a nondiscriminatory fashion. It was applied to improve Democratic prospects in one single district. It was not applied to districts favoring Democrats as well as to those favoring Republicans, so competitiveness cannot justify the deviation. We have found that partisanship motivated the Democratic commissioners to support this change, since both expressed support for it before there was any mention of presenting District 8 to the Department of Justice for the sake of preclearance.

But while partisanship played some role, plaintiffs have not carried their burden to demonstrate that partisanship predominated over legitimate factors. Because Commissioner McNulty's change only slightly increased the level of population inequality in District 8 and the other affected districts, let alone the plan as a whole, plaintiffs must make a particularly strong showing to carry their burden. *Cf. Karcher*, 462 U.S. at 741 ("The showing required to justify population deviations is flexible, depending on the size of the deviations, [etc.]"). As noted in our findings, the changes in population inequality from draft map to final map that can be attributed to the vote on Commissioner McNulty's proposed change is an increase of 0.7 percent deviation in District 8, a decrease

of 1.6 percent in District 11, an increase of 2.4 percent in District 12, and an increase of 1.4 percent in District 16. Altogether, the change resulted in a small decrease in deviation in one district and small increases in deviation in three districts. While there is some increase in deviation that can be attributed in part to partisanship, it is not a particularly large increase.

We have also found that the preclearance goal played a role in the change to District 8. Consultants and counsel suggested pursuing it for the sake of preclearance, and only then did Chairwoman Mathis endorse the idea. Without her vote, there would not have been a majority to adopt that change. In light of the small deviations resulting from this change order and because legitimate efforts to achieve preclearance also drove the decision, plaintiffs have not proved that partisanship predominated over legitimate reasons for the Commission as a whole.

We have concluded that compliance with the Voting Rights Act is a legitimate state policy that can justify minor population deviations, that the deviations in the map in large part resulted from this goal, and that plaintiffs have failed to show that other, illegitimate motivations predominated over the preclearance motivation. Therefore, plaintiffs' challenge to the map under the one-person, one-vote principle fails.

V. Conclusion

We find in favor of the Commission on plaintiffs' claim that the Commission's legislative redistricting plan violated the one-person, one-vote principle of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. We order the entry of judgment for the Commission.

APPENDIX C — ROSLYN O. SILVER OPINION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED APRIL 29, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-12-894-PHX-ROS-NVW-RRC

WESLEY W. HARRIS, *et al.*,

Plaintiffs,

vs.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Defendants.

ROSLYN O. SILVER, District Judge, concurring in part, dissenting in part, and concurring in the judgment:

I agree plaintiffs have not proven a violation of Equal Protection and, therefore, I concur in the judgment against them. I also join the rulings in connection with the motion for judgment on the pleadings. I disagree, however, on the issue of abstention. Also, I have my own view of the standard applicable to plaintiffs' claim and whether plaintiffs proved partisanship was involved in crafting the final map.[1]

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1. As noted in the February 22, 2013 Order, I disagreed with the resolution of the motion for protective order. The case has now

Appendix C

1. *Pullman* Abstention

In December 2012, defendants requested we stay this case and defer hearing plaintiffs' federal claim until plaintiffs' state-law claim could be resolved by the Arizona courts. At that specific time, I believed abstention was appropriate. The following explains why I reached that conclusion and why, if the motion were being decided today, abstention likely would not be appropriate.

As outlined in the per curiam opinion, *Pullman* abstention may be appropriate when three conditions are met. "First, the complaint must touch on a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Cano v. Davis*, 191 F. Supp. 2d 1140, 1142 (C.D. Cal. 2002) (quotation omitted). Second, it must be clear that the federal constitutional claim presented in the complaint "could be mooted or narrowed by a definitive ruling on the state law issues" raised by the complaint. *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 888 (9th Cir. 2011) (quotation omitted). And third, "the possibly determinative issue of state law is unclear." *Id.* (quotation omitted). In my view, all three conditions were met.

On the first condition, as observed by another three-judge panel hearing a redistricting suit, "[r]edistricting is undoubtedly a sensitive area of state policy." *Cano*, 191

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proceeded to trial and the commissioners testified at length. In these circumstances, I do not believe it necessary to set forth why I would have granted the protective order in part.

F. Supp. 2d at 1142. Neither plaintiffs nor the per curiam opinion disputes this condition was satisfied.

On the second condition, resolution of the state-law claim raised by plaintiffs might have removed the need to address their federal constitutional claim. In opposing the request for abstention, plaintiffs seemed to be claiming the second condition was not satisfied because it was not *certain* that resolving their state-law claim would end the case. But certainty is not required. As explained by the Ninth Circuit, it need not be "absolutely certain" that the state-law issue will "obviate the need for considering the federal constitutional issues." *Sinclair Oil Corp. v. Cnty. of Santa Barbara*, 96 F.3d 401, 409 (9th Cir. 1996). It is sufficient that the state-law issue "may" have some impact on the federal claim. *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 379 (9th Cir, 1983). More importantly, however, plaintiffs' own statements indicated that they believed resolution of their state-law claim *would* end this case. That is, plaintiffs argued they were certain to prevail on their state-law claim. If plaintiffs were correct, the federal claim need not have ever been addressed, meaning the second condition for abstention was satisfied.

Finally, on the third condition, and despite plaintiffs' arguments that their state-law claim was a sure winner, there was genuine uncertainty about the meaning of the Arizona constitutional provision regarding equal population. Plaintiffs believed "the Arizona Constitution's equal population clause is plain" and it required absolute equality of population. While defendants disagreed with plaintiffs' reading, they conceded there was *some*

uncertainty about the meaning of Arizona's equal population requirement. That concession was wise given the language of the Arizona Constitution coupled with the Arizona Supreme Court's cryptic comments in a prior redistricting case. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 686 (Ariz. 2009). And, in any event, the required amount of "uncertainty" for *Pullman* purposes is not very difficult to show.

"Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law." *Pearl Inv. Co. v. City and Cnty. of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985). That uncertainty might be because of a statutory ambiguity or "because the question is novel and of sufficient importance that it ought to be addressed first by a state court." *Id.* In my view, we do not know how the Arizona courts would interpret the state constitutional language. Accordingly, the third condition was met.

Because the three *Pullman* conditions were met, the question becomes whether some other factor rendered abstention inappropriate. The Supreme Court has recognized that a court deciding whether to abstain must be cognizant that "abstention operates to require piecemeal adjudication in many courts," possibly "delaying ultimate adjudication on the merits for an undue length of time." *Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964). And abstention is particularly troublesome in voting rights cases "because of the importance of safeguarding

the right to vote." *Cano v. Davis*, 191 F. Supp. 2d 1140, 1142 (C.D. Cal. 2002). But even in a voting rights case, the Ninth Circuit affirmed a decision to abstain when the abstention order was issued only six months before a relevant voting deadline. *Badham v. U.S. Dist. Court*, 721 F.2d 1170, 1174 (9th Cir. 1983). In doing so, the court noted the focus should be on the risk that delay would harm the right to vote. Because, in that case, there was no substantial risk of harm to that right, abstention was appropriate. *Id.*

The per curiam opinion relies on the possibility of undue delay as the primary basis for rejecting the abstention request. But *at the time the motion was filed* it was very unlikely plaintiffs' right to vote would have been impacted if they were sent to state court. The Commission represented that, upon arriving in state court, it would stipulate to consolidating the preliminary injunction hearing with the trial. It also agreed that the discovery performed in federal court could be used in state court. The first relevant deadline for the 2014 elections was April 28, 2014, the first day candidates could file their nomination petitions. Thus, when the abstention motion was filed in December 2012, sending the parties to state court would have given the state court approximately fourteen months to order relief before any possible harm could be suffered. Given that length of time, the state courts would have had ample time to act.[2]

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2. I recognize that redistricting cases pose a unique abstention problem. In the normal *Pullman* setting, the federal court stays the federal claim and, if the parties are not able to obtain timely relief in state court, they can return to federal court to litigate their

Appendix C

In addition to concerns about the possible delay should the parties be sent to state court, the per curiam opinion also seems to rely on the dismissal of plaintiffs' state-law claim as a special factor weighing against abstention.[3] But the absence of a pending state-law claim should have had no impact on the abstention inquiry. In *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 81 (1975), the Supreme Court found *Pullman* abstention appropriate even though the plaintiffs in that case "did not expressly raise a statelaw claim in their complaint." In *Moore*, there was an issue of state law lurking in the background of the federal Equal Protection claim that, if decided a certain way, *might* have negated the factual premise for the federal claim. *Id.* at 85-88. There is no real dispute that, in this case, resolution of the state-law claim raised by plaintiffs might have had a similar impact.

Finally, now that the first important election deadline is upon us, I recognize that the abstention calculus is significantly different. If the motion were being decided

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federal claim. *Cf. Harris Cnty. Comm'rs Court v. Moore*, 420 U.S. 77, 84 (1975) (abstention not appropriate when litigation already "long delayed"). But under Supreme Court precedent applicable to redistricting suits, if plaintiffs had been forced to file in state court, we would have been absolutely barred from proceeding on the federal claim until the state court litigation concluded. *Growe v. Emison*, 507 U.S. 25, 33 (1993). Plaintiffs did not provide any persuasive reason why this complication would matter because the state court would have had ample time to address the state-law claim before any harm was suffered.

3. The state-law claim was formally dismissed at the same time the abstention motion was denied. Thus, even if a pending state-law claim is a necessary prerequisite to abstention, it was met at the relevant time.

today, abstention likely would not be appropriate because the state court would not have time to provide relief. Thus, today I am comfortable reaching the merits of plaintiffs' claim. I note only that something is not quite right with plaintiffs choosing to litigate a very tenuous federal claim when they have a state-law claim they believe is guaranteed to give them a victory. Therefore, absent the looming election deadlines, I would still be inclined to send the parties to state court.[4]

2. Partisanship Likely Not Cognizable Basis for Suit

The per curiam opinion wisely refuses to decide whether minor population deviations, *i.e.* deviations below ten-percent, motivated by partisanship offend the Equal Protection Clause. I doubt they do.

The redistricting process, with all its adversarial tensions, has *always* been recognized as a profoundly partisan process. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are

4. Because the Eleventh Amendment barred the state-law claim, plaintiffs' alternative request to certify the state-law issue to the Arizona Supreme Court was correctly denied. It would have been a futile gesture to certify the question because we could not have ordered relief on the basis of state law, regardless of how the Arizona Supreme Court might have ruled. *See Citizens for John W. Moore Party v. Bd. of Election Comm'rs*, 781 F.2d 581, 584-86 (Easterbrook, J., dissenting) (noting that certification is not appropriate when the Eleventh Amendment means relief cannot be granted on basis of state law).

inseparable from districting and apportionment."). The Supreme Court has repeatedly noted without condemnation that entities responsible for redistricting often act in explicitly partisan ways, such as drawing lines to protect incumbents or drawing lines to ensure a particular district elects a Democratic representative. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 248 (2001) (plan was drawn "to protect incumbents–a legitimate political goal"); *id.* at 245 (noting a legislature might draw lines to "secure a safe Democratic seat"). And while partisanship is not a terribly noble means of establishing parameters impacting the fundamental right to vote, it has long been a given, embedded in our system of government. Thus, actual use of partisanship–or at least allegations that partisanship drove redistricting decisions–are inevitable as long as partisan entities are responsible for redistricting.

Of course, Arizona has attempted to "*remove* redistricting from the political process by extracting [the authority to conduct redistricting] from the legislature and governor and instead granting it to an independent commission of balanced appointments." *Ariz. Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267, 1273 (Ariz. 2012). But the very structure of Arizona's reformed redistricting process reflects that partisanship still plays a prominent role. In practice, the Arizona Constitution requires two commissioners be Republicans, two commissioners be Democrats, and the fifth commissioner be neither a Republican nor a Democrat.[5] The fact that

5. The Arizona Constitution requires the twenty-five candidates for commissioner consist of "ten nominees from each of the two

one's party affiliation is a qualifying characteristic to serve as a commissioner is at least an implicit acknowledgment that redistricting remains inextricably intertwined with partisan concerns.

Recognizing that partisanship remains an inevitable ingredient in Arizona's redistricting scheme is not the same as saying redistricting decisions actually based on partisanship are immune from challenge. Under the federal constitution, it may be possible to challenge redistricting plans when partisan considerations go "too far." *See Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (noting most Justices believed partisanship "*is* a traditional criterion, and a constitutional one, so long as it does not go too far"). But it is presently obscure what "too far" means. It is highly improbable that *any* use of partisanship is "too far." However, maybe partisanship can be used to justify population deviations below ten-percent but not above ten-percent. Or maybe it is unconstitutional to make decisions based on partisanship only if those decisions have "an actual discriminatory effect on" a particular political group. *Cf. Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (attempting to establish standard for "political gerrymandering" claim). The Supreme Court has not yet indicated which of these possibilities, if any, is correct. And the one case plaintiffs repeatedly rely upon to support their theory cannot bear nearly the weight they wish.

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largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties." Ariz. Const. art. IV, pt. 2, § 1(5).

Appendix C

Plaintiffs believe *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) "cast extreme doubt on whether partisanship alone ever could justify deviations from population equality." But a brief exploration of the facts, legal holdings, and subsequent history of *Larios* show plaintiffs' reliance is not well-placed.

In *Larios*, a three-judge panel addressed the map drawn by the Democratic majority in the Georgia General Assembly. After considering the evidence, the court clearly identified the Democrat legislators as having "made no effort to make the districts as nearly of equal population as was practicable." *Id.* at 1341. Instead, the Democrats had entered the redistricting process under the assumption they were free to manipulate the maps however they wished, provided the final population deviations were kept below ten percent. With that assumption in mind, the final map contained population deviations of 9.98%. *Id.* In addition, the Democrats refused to allow Republican legislators meaningful involvement in the process. *Id.*

The record made "abundantly clear that the population deviations in the Georgia House and Senate" were driven by two prohibited considerations. *Id.* at 1341. First, the deviations were a "concerted effort to allow rural and inner-city Atlanta regions of the state to hold on to their legislative influence (at the expense of suburban Atlanta), even as the rate of population growth in those areas was substantially lower than that of other parts of the state." *Id.* at 1342. And "[s]econd, the deviations were created to protect incumbents in a wholly inconsistent and discriminatory way." *Id.* In reaching these conclusions, the *Larios* court

stressed it was not required to "resolve the issue of whether or when partisan advantage alone may justify deviations in population, because the redistricting plans [were] plainly unlawful" on other grounds. *Id.* at 1352.

The Supreme Court summarily affirmed *Larios*. *Cox v. Larios*, 542 U.S. 947 (2004). That summary affirmance meant the Supreme Court agreed with the judgment "but not necessarily the reasoning by which it was reached." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (quotation omitted). In other words, the summary affirmance "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Id.* There are no prior decisions directly rejecting partisanship as a justification for minor population deviations, meaning the summary affirmance has little value on that issue. But Justice Scalia voted to set the case for argument, likely out of a concern the lower court decision would be read as addressing the issue. As explained by Justice Scalia, the Supreme Court has never made clear whether "politics as usual" is a "'traditional' redistricting criterion" that can be used to justify minor population deviations. *Larios*, 542 U.S. at 952 (J. Scalia, dissenting). Justice Scalia also noted that, in a case the previous term, "all but one of the Justices agreed [partisanship] *is* a traditional criterion, and a constitutional one, so long as it does not go too far." *Id.*

With the lower court's explicit refusal to address the partisanship issue, and the Supreme Court's summary affirmance, I doubt *Larios* offers *any* useful guidance

on the question of partisanship.[6] Absent other instructive authority supporting their claim, we might have been better served by dismissing plaintiffs' federal claim for failure to state a claim on which relief can be granted. *See Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 313 (E.D.N.Y. 2003) (granting motion to dismiss because an allegation of "rank partisanship by the Democratic majority is not violative of the Fourteenth Amendment"). But having allowed plaintiffs to survive the motion to dismiss, we must now reach the merits. Fortunately, we need not decide whether partisanship can be considered in redistricting because, in fact, partisanship was not behind the final map. Unfortunately, reaching the merits required a lengthy trial and a tremendous expenditure of resources. If plaintiffs' theory is viable, and maps containing minor deviations can be challenged as attempts to give one political party an electoral advantage, the federal courts should prepare to be deluged with challenges to almost every redistricting map. If that course is before us, a decision by the Supreme Court on whether this theory is viable, and if so when, would be welcomed.

3. Standard Applicable to Plaintiffs' Claim

Assuming minor population deviations due to partisanship present a cognizable Equal Protection claim, the question is what standard applies to such a claim. I believe the correct standard is that plaintiffs were

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6. In 2006, Justice Kennedy explained that the *Larios* district court opinion did not give "clear guidance" on when partisanship can justify population deviations. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423 (2006).

required to prove partisanship was the *actual* and *sole* reason for the population deviations.

In their initial filings, plaintiffs explicitly agreed they needed to show the "sole reason" behind the population deviations was partisanship.[7] All three judges seemingly agreed because, in resolving the motion to dismiss, we set forth the standard as requiring plaintiffs "prove that 'the asserted unconstitutional or irrational state policy is the *actual reason* for the deviation.'" The opinion we relied on, *Rodriguez v. Pataki*, further explains a plaintiff must show "the deviation in the plan results *solely* from the promotion of an unconstitutional or irrational state policy." 308 F. Supp. 2d 346, 365 (S.D.N.Y. 2004) (quoting *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994)). Thus, from the very beginning of this case, plaintiffs were on notice–and they did not seem to dispute–that they needed to establish partisanship was the actual and sole reason for the population deviations.

As the case developed, plaintiffs apparently were enlightened and rethought their stance by beginning to describe the standard as requiring they show "no constitutional goal justified" the population deviations. In connection with that softened burden, plaintiffs also,

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7. Plaintiffs' filings could not have made it any clearer that they conceded the issue was whether partisanship was the "sole" cause for the population deviations. *See Plaintiffs' Response in Opposition to Motion to Dismiss* ("[Defendants] diluted Plaintiffs' votes and the votes of all citizens residing in the overpopulated districts solely to maximize the Democratic Party's representation in the Legislature.").

much to defendants' frustration, began to substantively change their theory of the case such that partisanship was advanced merely as the "principal theory," along with other prohibited characteristics such as race being implicated. But despite plaintiff's vacillations, I always understood their case as based on the allegation that partisanship drove the entirety of the redistricting process.[8]

By the time of trial, plaintiffs were again describing their claim as grounded on a belief that partisanship was the "sole" explanation for the population deviations. *See Plaintiffs' Proposed Findings of Fact* (Final Map was created "for the sole purpose of providing Democratic candidates with partisan advantage"); *Plaintiffs' Trial Brief* ("The IRC systematically under-populated Republican plurality districts and over-populated Democratic plurality districts for the *sole* purpose of providing Democratic candidates with a partisan advantage ") (emphasis added). The Final Pretrial Order we approved accepted this framing, describing the case as requiring resolution of whether the population deviations were done "for the sole purpose of partisanship." I am not aware of any clear request by plaintiffs that we adopt something other than the "actual and sole reason" standard. And I believe there are compelling reasons for retaining this very high standard on this type of claim.

Adopting a lower standard on this type of claim invites individuals "to challenge any minimally deviant

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8. As described on the last day of the trial, plaintiffs' theory was that "this pattern of deviation was driven by partisanship."

redistricting scheme based upon scant evidence of ill will by district planners, thereby creating costly trials and frustrating the purpose of [the Supreme Court's] 'ten percent rule.'" *Rodriguez*, 308 F. Supp. 2d at 365. Federal court challenges to redistricting plans are not only expensive and very time-consuming, they are also "a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

Moreover, the bright-line standard of requiring plaintiffs establish the actual and sole reason behind redistricting decisions is workable. Under this standard, a court need not engage in the formidable task of divining which reason "predominated" over the myriad of possible reasons presented by those defending a new map. Instead, a court must simply determine whether the map was drawn *solely* for an illegitimate reason. If other reasons were involved, that ends the case.

Plaintiffs repeatedly stated they would establish partisanship as the actual and sole reason for the population deviations and we adopted that as the standard plaintiffs needed to meet. I believe that remains the appropriate standard.

4. No Evidence of Partisanship

The history of the redistricting process, as well as when and who ordered various map changes, are documented in the record and not subject to dispute. Therefore, I join most of the factual findings in the per curiam opinion. I cannot, however, join those findings

pointing to partisanship as motivating certain actions. I do not believe plaintiffs carried their burden of establishing that partisanship, rather than neutral redistricting criteria, motivated the Commission.

The final map comes to us with a "presumption of good faith." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). It was never clear to me how plaintiffs planned to overcome this presumption. Plaintiffs made general allegations about a plan to harm the interests of the Republican party but they never specified *who* was allegedly behind the plan.[9] At various points during the litigation, it appeared plaintiffs believed the Commission's counsel, the Commission's experts, the Commission's mapping consultant, and even the Republican commissioners themselves, were all motivated by the desire to systematically harm the Republican party's electoral chances.[10] And even having sat through the trial, it remains unclear to me whether plaintiffs were trying to prove a knowing plot amongst all these actors or coincidental uncoordinated acts of partisan

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9. Plaintiffs also had difficulty identifying what would be a sufficient reason for the population deviations at issue. For example, plaintiffs' complaint recognized "compliance with the Voting Rights Act" was a "legitimate state interest."

10. Plaintiffs' expert also had significant difficulty deciding who was behind the plan to harm Republicans. Originally, the expert stated "the individuals who were drawing the maps for the Commission were engaged in intentional political gerrymandering." (Trial Tr. 677). At trial, the expert abandoned that position. (Trial Tr. 677, 685). Later, the expert agreed that one of the *Republican* commissioners had "engaged in invidious discriminatory vote dilution" to benefit the Democratic party. (Trial Tr. 719).

discrimination that occurred merely by happenstance. But regardless of who plaintiffs believed was responsible, I did not see sufficient evidence that anyone set out to harm the Republicans. And certainly not enough evidence to establish the Commission as an entity did so.

a. The Alleged Plot Failed

Before directly addressing why I believe plaintiffs failed to prove their case, it is worth noting that the 2012 election using the new map proved their theory has no basis in reality. In the 2012 elections, Republicans won 17 out of 30 (56.6%) senate seats and 36 out of 60 (60%) house seats. As of June 2012, Republicans had a statewide two party registration share of 54.4%. Thus, under the map plaintiffs believe was created to systematically harm Republican electoral chances, Republicans are *overrepresented* in the legislature. In other words, assuming the relevant actors drew the map to harm the Republican party's electoral chances, the evidence shows the actors failed to achieve their goal. Because this is not a political gerrymandering case, these results are not necessarily fatal to plaintiffs' case. *See Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (political gerrymandering claim requires proof of "actual discriminatory effect"). But it is hard to take plaintiffs' challenge seriously given that the alleged contrivance against Republicans failed. *See* Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. Pa. J. Const. L. 1001, 1062 (2005) ("And certainly it makes sense not to overturn a plan that, whatever the intent of the planners, did not actually hurt their political opponents.").

b. No Explanation for Choosing Harder Path

Beyond having a theory not grounded in actual harm to a particular political party, plaintiffs also failed to offer any coherent explanation why the Commission would have chosen such an elaborate and difficult way to advantage the Democratic party. That is, assuming everyone involved in the redistricting process was driven solely by a desire to advantage Democrats over Republicans, they had a much easier path available to them than engaging in the complicated task of minor population deviations: the Commission could have set up districts of equal population but drawn the district boundaries differently. *See Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("[I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another."). That would have resulted in far greater partisan impact and the approach would have had the added benefit of being almost impossible to challenge. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (rejecting political gerrymandering claim). It is not sensible to conclude everyone involved in the process–or at least whomever plaintiffs believe are responsible for the alleged discrimination–decided to adopt a method that was less effective and more susceptible to challenge than an obvious and available alternative.

c. Insufficient Evidence of Partisanship

Turning to the merits of plaintiffs' claim, the evidence is overwhelming the final map was a product of the commissioners's consideration of appropriate redistricting

criteria. In particular, the commissioners were concerned with obtaining preclearance on their first attempt.[11] Before this round of mapping, Arizona had *never* obtained preclearance on its first legislative map. Therefore, the focus on first-attempt-preclearance was reasonable given that, at that time, any failure to obtain preclearance on the first attempt would have meant Arizona could not "bail out" of Section 5 of the Voting Rights Act for another ten years. 42 U.S.C. § 1973b(a)(1)(E); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 199 (2009) (explaining "bail out" requirements). In these circumstances, the commissioners were not content to make simply a plausible case for preclearance; rather, the commissioners set out to make the absolute strongest possible showing for preclearance.

To present the best preclearance case possible, the Commission's counsel and consultants recommended ten minority ability-to-elect districts. The Commission agreed with that advice and the draft map contained ten districts identified by the Commission as ability-to-elect districts. Plaintiffs presented no convincing evidence this advice was the result of a conscious effort to harm Republicans. In fact, it is not even clear whether plaintiffs contend the draft map was the result of partisanship. But if partisanship actually were at the heart of the draft map, and assuming the Republican commissioners were not Democratic sleeper-agents, one would expect the record to be replete with objections by the Republican commissioners. It is not.

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11. Plaintiffs' counsel conceded obtaining preclearance was a legitimate state interest.

I view the Republican commissioners' silence as evidence that partisanship was not the driving force behind the draft map.

With no credible evidence the draft map was drawn to favor the Democratic party, the focus turns to whether the changes to the draft map were motivated by partisanship or if they can be explained on some other ground. Again, the vast majority of the changes to the draft map were agreed to by the Republican commissioners. And as observed by Commissioner Mathis, all of the commissioners are "very strong people" who would have spoken up if they had an objection. I do not believe we are in a better position to divine invidious discrimination than the partisan actors actually involved in the process.

Much more important than the relative lack of objections is that plaintiffs did not identify, with reasonable particularity, the exact changes to the final map they believe were due solely to partisanship. Plaintiffs initially seemed to be claiming *every* aspect of the final map was due to partisanship. However, at trial and in their post-trial briefing, they focused primarily on three districts: Districts 8, 24, and 26. The per curiam opinion explains some of the changes to Districts 24 and 26 and why the Commission believed compliance with the Voting Rights Act supported such changes. While plaintiffs disagree with those actions, I did not see any evidence that partisanship, rather than compliance with the Voting Rights Act, was the *actual* reason for the changes in Districts 24 and 26.

As for District 8, the per curiam opinion concludes partisanship did motivate certain changes. At trial, however, Commissioner McNulty explained those changes were meant to make District 8 more competitive. I found her explanation reasonable and credible. Also, when asked squarely whether these particular changes were due to any reason other than competitiveness and compliance with the Voting Rights Act, Commissioner McNulty said no. Again, I found her testimony credible. I would require much more evidence than what plaintiffs presented to conclude Commissioner McNulty was being untruthful in her trial testimony. More importantly, even if Commissioner McNulty *did* make changes to District 8 with partisanship in mind, that is not enough.

Evidence that one commissioner was motivated by partisanship is only a good starting point and it is a given that four of the five commissioners always have at least *some* partisan self-interest. There must be evidence that two other commissioners had that same motivation. But the Supreme Court has cautioned that "inquiry into legislative motive is often an unsatisfactory venture" because "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates . others to enact it." *Pac. Gas and Elec. Co. v. State Energy Res. Conservation*, 461 U.S. 190, 216 (1983). Thus, even if Commissioner McNulty was motivated by partisanship, plaintiffs would still need to show two commissioners voted with Commissioner McNulty "at least in part 'because of,' not merely 'in spite of,'" the alleged adverse effects that particular change would have on Republicans. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). I saw no such evidence.

Appendix C

In the end, Plaintiffs' evidence of partisanship consisted largely of pointing to the final map and asking the Court to conclude by inference only that the pattern reflected in the map established an intent to discriminate against Republicans.[12] This appears to be an attempt to invoke the "disparate impact" theory of liability. But only in exceptionally rare cases is disparate impact enough to prove an Equal Protection violation. *See, e.g., Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of [invidious discrimination] forbidden by the Constitution."). Those rare cases involve situations of a clear pattern unexplainable on any legitimate grounds. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, *unexplainable on grounds other than race*, emerges from the effect of the state action ") (emphasis added). Here, the final map's population deviations *can* be explained on grounds other than partisanship.

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12. Plaintiffs repeatedly claimed the partisan breakdown of the final population deviations could not be explained by chance. Of course, there is no claim that the map was designed at random, meaning the argument that the deviations could not have occurred by chance is trivial. More importantly, plaintiffs fail to take account of a basic problem always presented in cases where the court is asked to infer intent based on statistics: "statistics demonstrating that chance is *not* the more likely explanation are not by themselves sufficient to demonstrate that [reliance on the prohibited characteristic] *is* the more likely explanation." *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 553 (9th Cir. 1982). In other words, a statistical aberration negating chance is very different from a statistical aberration establishing invidious intent.

Appendix C

The final map represents an attempt to satisfy legitimate redistricting criteria, especially the Voting Rights Act. As observed in the per curiam opinion, "changes that strengthened minority ability-to-elect districts were also changes that improved the prospects for electing Democratic candidates." In other words, the changes the Commission made to strengthen its case for complying with the Voting Rights Act also had the effect of improving Democratic prospects. In light of this, the alleged pattern in the final map easily is explainable on grounds other than partisanship.

I join the judgment against plaintiffs.

DATED this 29th day of April, 2014.

/s/
Roslyn O. Silver
Senior United States
District Judge

APPENDIX D — NEIL V. WAKE DISSENT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED APRIL 29, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-12-00894-PHX-ROS-NVW-RRC

WESLEY W. HARRIS, *et al.*,

Plaintiffs,

vs.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Defendants.

NEIL V. WAKE, District Judge, concurring in part, dissenting in part, and dissenting from the judgment:

In this action voters challenge the final map of Arizona legislative districts approved by the Independent Redistricting Commission on January 17, 2012. They allege that the districts violate the one person, one vote requirement of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by systematically overpopulating Republican plurality districts and underpopulating Democratic plurality districts with no lawful justification for deviating from numerical equality. Arizona's final legislative district map violates the Equal Protection Clause unless the divergence from equal population is "based on legitimate

considerations incident to the effectuation of a rational state policy," *Reynolds v. Sims*, 377 U.S. 533, 579, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), "that are free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710, 84 S. Ct. 1449, 12 L. Ed. 2d 620 (1964).

Partisan advantage is not itself a justification for systematic population inequality in districting. No authority says it is, and neither does the Commission or any judge of this Court. So the Commission must point to something else to justify its deviation. Without something else, there is nothing to weigh against the force of equality, and this inequality must fall under constitutional doctrine settled for half a century.

The Commission contends the systematic population deviation for Democratic Party benefit was permissible to increase the likelihood of obtaining preclearance required by Section 5 of the Voting Rights Act. So this case turns on whether systematic population inequality is a lawful and reasonable means of pursuing preclearance.

But after the trial, the United States Supreme Court held Section 5 preclearance unenforceable, extinguishing that sole basis for this deviation. We must apply current law in pending cases, especially cases to authorize future conduct. So even if Section 5 saved the inequality when adopted, it cannot save the inequality for future elections. The Court exceeds its power in reanimating Section 5 to deny the Plaintiffs equal voting rights for the remaining election cycles of this decade.

If we do look back at Section 5, it never had the force the Commission hopes. The Court further errs when it holds, for the first time anywhere, that systematic population inequality is a reasonable means of pursuing Voting Rights Act preclearance. That is contrary to the text, purpose, case law, and constitutional basis for Section 5 preclearance. Until struck down, Voting Rights Act preclearance was a legitimate and mandatory purpose in redistricting for covered jurisdictions. But its legitimacy in general has no connection to the principled bases for compromising population equality. Compliance with the Voting Rights Act requires line-drawing with an eye to expected voting behavior, but only within equal population. Section 5 does not require or permit systematic inequality of population that would otherwise violate the Equal Protection Clause. It does not authorize the federal executive branch to exact such inequality for preclearance, a power the Attorney General disclaims. Nor does it license redistricting authorities to volunteer inequality to the Attorney General for which he never asks. The Commission's reliance on the Voting Rights Act for systematic malapportionment is precluded by the plain language of Section 17 that nothing in the Act "shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person." 42 U.S.C. § 1973n.

Judge Clifton correctly finds that the Commission was actually motivated by both party advantage and hope for Voting Rights Act preclearance. So we have a majority for that finding of fact. And while that fact is obvious on this record, the finding of partisan motive is not needed to make the case. No precedent would require proof and a finding of

subjective purpose of party advantage when it is already proven that the systematic numerical inequality has no justification that is legal and reasonable. It is enough to strike down this systematic overpopulation of Republican plurality districts and underpopulation of Democratic plurality districts that neither the Commission's stated reason to get preclearance nor its other actual motive of party advantage is a valid reason for population inequality. So even if one could believe that the aggressive party advantage was just a side effect and no part of the wellsprings of conduct, the Commission's only offered justification still falls. With no valid counterweight, the population-skewed map falls to the force of equal voting rights under the Constitution.

When voting districts were set without standards and behind closed doors, true reasons for systematic population deviation were easily disguised. But in states that have made the redistricting process transparent and accountable with limited grounds to deviate, it is now sometimes possible to prove that systematic population inequality for party advantage has no other reason, or none that passes under equal protection doctrine.

No better example could be found than this. Of 30 legislative districts, the 18 with population deviation greater than ±2% from ideal population correlate perfectly with Democratic Party advantage. The Commission majority showed other partisan bias, but even without that, the statistics of their plan are conclusive. Because this population deviation range of 8.8% is under 10%, the Plaintiffs have the burden of showing it is not

"incident to effectuation of a rational state policy." The Commission offers no justification except Voting Rights Act preclearance, which is insufficient as a matter of law. The Commission knew the legal risk they were taking in grounding systematic numerical inequality on the Voting Rights Act. The circumstance that the Commission took that risk with advice of counsel does not make losing the gamble as good as winning, not when they are gambling with other people's rights. The Plaintiffs have carried their burden. This numerical dilution or inflation of all the votes in 60% of Arizona's legislative districts for nearly two million voters cannot be squared with our fundamental law of equal voting rights.

The Commission has been coin-clipping the currency of our democracy—everyone's equal vote—and giving all the shavings to one party, for no valid reason. The novel and extraordinary claim of Voting Rights Act license to dilute votes systematically and statewide should be rejected. That should decide this case and end our inquiry. This plan must be sent back and done again.

I. THE ARIZONA REDISTRICTING PROCESS

By an initiative measure in 2000, Arizona voters removed legislative and congressional redistricting from the legislature and entrusted them to an Independent Redistricting Commission under mandatory processes with substantive standards. *See* Ariz. Const. art. IV, pt. 2, § 1. Four party commissioners are appointed, one each by the highest-ranking majority and minority members of the Senate and the House of Representatives. They choose

an independent fifth member. All appointments are from 25 nominations made by another commission.

The constitutional amendment requires the Commission to follow a four-step process. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 597, 208 P.3d 676, 686 (2009). First, the Commission must create "districts of equal population in a grid-like pattern across the state." Ariz. Const. art. IV, pt. 2, § 1(14). Second, the Commission must adjust the equally populated grid map "as necessary to accommodate" compliance with the United States Constitution and the United States Voting Rights Act and then to accommodate the remaining five goals "to the extent practicable": (1) equal population; (2) geographically compact and contiguous districts; (3) respect for communities of interest; (4) use of visible geographic features, city, town, and county boundaries, and undivided census tracts; and (5) competitive districts, where such districts would create no significant detriment to the other factors. *Id.* § 1(14)(A)—(F). Third, the Commission must advertise their adjusted draft map for at least 30 days and consider public comments and recommendations made by the Arizona legislature. *Id.* § 1(16). Lastly, the Commission must establish final district boundaries and certify the new districts to the Arizona Secretary of State. *Id.* § 1(16)—(17).

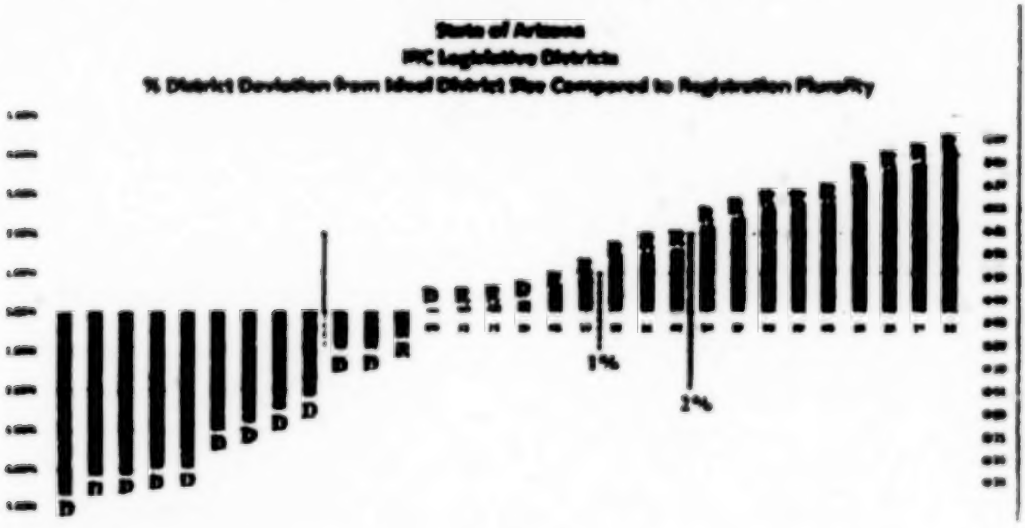
Other states have also "adopted standards for redistricting, and measures designed to insulate the process from politics." *Vieth v. Jubelirer*, 541 U.S. 267, 277 n.4, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004) (identifying Hawaii, Idaho, Iowa, Maine, Montana, New Jersey, and

Washington). In 2009, 13 states gave a redistricting commission primary responsibility for drawing the plan for legislative districts, five states required a backup commission to draw the plan if the legislature failed to do so, two states had an advisory commission, and Iowa required nonpartisan legislative staff to develop maps without any political data to be voted upon by the legislature. National Conference of State Legislatures, *Redistricting Commissions*, http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx (last visited April 23, 2014).

In Arizona, the Commission is required to comply with the state public meetings law and constitutional procedural and substantive requirements. Transcripts of their meetings are available to the public. The Commission's weighing of considerations, including the advice they received from counsel and consultants, is laid bare for public and judicial scrutiny. The voters "imposed a specific process that the Commission must follow," and judicial review "must include an inquiry into whether the Commission followed the mandated procedure." *Ariz. Minority Coal. for Fair Redistricting*, 220 Ariz. at 596, 208 P.3d at 685. Limited substantive judicial review addresses only whether "the record demonstrates that the Commission took [the] goal[s] into account during its deliberative process" and whether "the plan lacks a reasonable basis." *Id.* at 597-98, 600, 208 P.3d at 686-87, 689.

On January 17, 2012, the Commission approved the 2012 final legislative map by a vote of three to two,

the independent chair and the two Democratic Party appointees against the two Republican Party appointees. In the prior decade the first redistricting commission drew no district with a population deviation greater than ±2.42%, not for any reason, including Voting Rights Act preclearance, which was eventually received. In contrast, the 2012 map establishes 30 legislative districts with a maximum population deviation of 8.8%. Nine districts have populations that exceed the ideal population by more than 2%. All of those districts have more registered Republicans than registered Democrats. Nine other districts are underpopulated by more than 2%. All of those districts have more registered Democrats than registered Republicans. Therefore, of the 18 districts that deviate more than ±2% from ideal population, all are underpopulated Democratic-leaning districts or overpopulated Republican-leaning districts. Here is the array of districts from most underpopulated to most overpopulated, showing predominant party registration:



(Trial Ex. 40.)

Appendix D

Districts 7, 4, 27, 3, 2, 24, 19, 30, and 8 are all underpopulated by more than 2% and contain more registered Democrats than Republicans (Democratic registration plurality). Districts 14, 20, 18, 28, 5, 16, 25, 17, and 12 are all overpopulated by more than 2% and contain more registered Republicans than Democrats (Republican registration plurality). The following table isolates the 18 districts with population deviations exceeding 2%.

			#	%
	7	203,026	-10,041	-4.7
	4	204,143	-8924	-4.2
	27	204,195	-8872	-4.2
	3	204,613	-8454	-4.0
	2	204,615	-8452	-4.0
	24	206,659	-6408	-3.0
	19	207,088	-5979	-2.8
	30	207,763	-5304	-2.5
	8	208,422	-4645	-2.2
	14	217,693	+4625	+2.2
	20	218,167	+5099	+2.4
	18	218,677	+5609	+2.6
	28	218,713	+5645	+2.6
	5	219,040	+5972	+2.8
	16	220,157	+7089	+3.3
	25	220,795	+7727	+3.6
	17	221,174	+8106	+3.8
	12	221,735	+8667	+4.1

(Doc. 35-1 at 101.)

II. PARTISAN ADVANTAGE ALONE DOES NOT JUSTIFY SYSTEMATIC UNEQUAL POPULATION

A. Unequal Population Under the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment "guarantees the opportunity for equal participation by all voters in the election of state legislators." *Reynolds v. Sims*, 377 U.S. 533, 566, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The right to vote is personal, and impairment of the constitutional right to vote touches a sensitive and important area of human rights:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Id. at 561-62. "Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there." *Id.* at 563. "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." *Id.* at 566 (citations omitted).

A person's place of residence "is not a legitimate reason for overweighting or diluting the efficacy of his vote." *Id.* at 567.

Each state is required to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 577. Although "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters," divergences from a strict population standard must be "based on legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 577, 579. To satisfy the Equal Protection Clause, legislative apportionment must result from "faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710, 84 S. Ct. 1449, 12 L. Ed. 2d 620 (1964). Deviation even for a permitted purpose is discriminatory and unconstitutional if applied only where it benefits one party. *Larios v. Cox*, 305 F. Supp. 2d 1335, 1339 (N.D. Ga. 2004) (three-judge court) (deviation to protect incumbents, but only Democrats), *aff'd*, 542 U.S. 947, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004).

Because some legitimate districting goals compete with numerical equality, states may weigh them against each other up to a point. There is a burden-shifting framework for population deviation claims. Generally, a legislative apportionment plan with a maximum population

deviation greater than 10% creates a prima facie case of discrimination and therefore must be justified by the state.[1] *Brown v. Thomson*, 462 U.S. 835, 842-43, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983). The plan may include "minor deviations," which is a technical term meaning less than 10%, free from arbitrariness or discrimination. But there is no safe harbor for population deviations of less than 10%. There is a rebuttable presumption that a population deviation less than 10% is the result of an "honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (quoting *Reynolds*, 377 U.S. at 577). The burden shifts to the plaintiff to prove that the apportionment was "an arbitrary or discriminatory policy." *Larios*, 305 F. Supp. at 1338-39 (citing *Roman*, 377 U.S. at 710); *Daly*, 93 F.3d at 1220.

In sum, arbitrariness and discrimination disqualify even "minor" population inequality within 10%. The flexibility accorded to states for those minor deviations, without the initial burden of justifying them, accommodates

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1. In contrast, congressional districts must be drawn with equal population "as nearly as is practicable." *Tennant v. Jefferson Cnty. Comm'n*, __ U.S. __, 133 S. Ct. 3, 5, 183 L. Ed. 2d 660 (2012) (total population variance of 0.79% was justified by the state's legitimate objectives). "[T]he 'as nearly as is practicable' standard does not require that congressional districts be drawn with 'precise mathematical equality,' but instead that the State justify population differences between districts that could have been avoided by 'a good-faith effort to achieve absolute equality.'" *Id.* (quoting *Karcher v. Daggett*, 462 U.S. 725, 730, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983)).

legitimate interests that are reasonably served by some population inequality. But it is tautologically true that legitimate state goals that harmonize with population equality can carry no weight against the constitutional value of equality. Those goals legitimately may be pursued, but not by population inequality.

B. Partisan Advantage

The Supreme Court has not decided whether partisan advantage itself is a permissible reason for population inequality, that is, whether it carries any weight or no weight against equality in the analysis.[2] *See, e.g., Cox v. Larios*, 542 U.S. 947, 951, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004) (Scalia, J., dissenting from summary affirmance) ("No party here contends that . . this Court has addressed the question" of whether a redistricting plan with less than 10% population deviation may be invalidated on the basis of evidence of partisan political motivation.); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) ("Even in addressing political motivation as a justification for an equal-population violation *Larios* does not give clear guidance.").

The Supreme Court precedents discussed above readily yield the conclusion that partisan advantage is not itself a legitimate, reasonable, and non-discriminatory

2. Nor has the Supreme Court addressed whether party advantage carries any weight against equality in the federal constitutional calculus if state law itself bars it, as Arizona does.

purpose for systematic population deviation. Again, the Commission does not argue that it is. General principles of voting rights capture the issue, and there is no contrary gravitational pull from any competing constitutional principle. Party discrimination in population punishes or favors people on account of their political views. It is discriminatory and invidious. It serves an unfair purpose at the price of a constitutional right that all voters have, regardless of how they plan to vote.

Bare party advantage in systematic population deviation carries no weight against the baseline constitutional imperative of equality of population. Under settled constitutional analysis, unless the Commission has some other legitimate, actual, and honest reason for the inequality, the force of equality must win out.

Federal law would have this force even if state law purported to legitimate population deviation for partisan advantage. Imagine a state statute that required Democratic-leaning districts to be overpopulated up to +5% and Republican-leaning districts to be underpopulated down to -5%. Such a statute would add no weight to the weightless purpose of party advantage and could not change the federal equal protection balance from what it would be without the statute. Arizona law makes our task even easier by excluding partisan advantage as a purpose for unequal population or anything else in redistricting. The Arizona Constitution twice mandates equal population, subject only to adjustments for four other permitted goals and compliance with federal law. Ariz. Const. art. IV, pt. 2, § 1(14). None of those permitted goals encompasses partisan political advantage.

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C. Systematic Inequality of Population for Partisan Advantage Is Sometimes Provable and Is Subject to Judicially Manageable Standards

Systematic inequality of population for partisan advantage is sometimes provable from the statistics alone and exclusion of other justifications. Where that demanding test is met, as it is here, the equal protection violation is proven and remediable.

Before the reform of redistricting procedures and substantive standards in Arizona and other states, it was usually possible to mask actual partisan purposes by overlaying some other arguable reason for the population deviation. In the absence of state-mandated standards and transparent processes, any standard permissible under federal law could be invoked after the fact and without regard to true motives. No doubt that will remain the case for specific instances of partisan population inequality. But Arizona now prohibits the secrecy of process and the indeterminacy of standards that previously put even systematic partisan deviation beyond judicial remedy because of the inability to exclude other explanations. In the states with redistricting reform, it can sometimes be proven that partisan advantage was a real and substantial cause of the deviation, with no additional reason, or none that is valid.

To be sure, when political actors are charged with applying even neutral criteria of districting, they will know and enjoy the political benefits of using that wide

discretion one way and not another. Political motivations will remain, resulting in population inequality here and there in innumerable line-drawing choices that are overlain with defensible neutral purposes even though they may not be the real purposes. Limitations of judicial competence weigh against inquiry as extensive as that of the redistricting authority itself to find and remedy specific abuses of equality.

But this case is not about a district here or there that is out of balance for partisan benefit. This is about systematic population inequality for party advantage that is not only provable but entirely obvious as a matter of statistics alone. A bright line requirement of statistical proof, not just anecdotal evidence, is well within judicial competence. By the expert evidence here, the neutral principles of districting are politically random, and it is statistically impossible for them to yield this perfect correlation of population inequality with one party advantage in 18 of 18 districts. But it does not take a Ph.D. to see this stark fact of intended party benefit. It would be reversible error to find the facts otherwise, even if the Commission did not admit it was consciously drawing party advantage. As thus narrowly defined, the test for proof of intended systematic party advantage—statistical proof and exclusion of other justifying reasons—will exclude all but the obvious cases, easily proven, as this one is. The low-hanging fruit is within the reach of the Equal Protection Clause even if the rest is not. Constitutional doctrine must mark out systematic population inequality, proven by statistics, as unreasonable, discriminatory, and actionable, provided no other legal reason saves it.

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Limitations of judicial competence that weigh against remedy of partisan gerrymandering even within equal population are no barrier to proof or remedy for systematic inequality of population for partisan advantage. Line-drawing within equal population can be done with an eye to expected voting behavior to serve some legitimate purposes. Line-drawing within equal population for unworthy purposes, like party advantage, escapes judicial remedy for lack of judicially manageable standards. *Vieth v. Jubelirer*, 541 U.S. 267, 281, 305, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004). But the narrow and bright line test stated above for proving discrimination in numerical inequality has no such infirmity. The sound reasons for judicial hesitation to remedy partisan gerrymandering within equal population do not fit the different wrong of systematic population inequality for partisan advantage with no other justification.

The systematic inequality for partisan purposes does not end the case if the inequality has other justification. Those unworthy partisan motives should not trump parallel valid motives. The equal protection analysis requires further inquiry whether those other justifications are legally sufficient and actual, honest motives. The Arizona Constitution's exclusion of all but a few permitted reasons to deviate from equal population leaves the Commission with only Section 5 preclearance to explain its pervasive party preference.

The Commission has not made and cannot make any general invocation of theoretically valid reasons for the unequal population. There is only the Voting Rights Act, on which the case now hangs.

Appendix D

III. PRECLEARANCE UNDER THE VOTING RIGHTS ACT DOES NOT REQUIRE OR PERMIT SYSTEMATIC POPULATION INEQUALITY

A. The Voting Rights Act and Section 5 Preclearance

The Voting Rights Act, enacted in 1965 to enforce the Fifteenth Amendment, "employed extraordinary measures to address an extraordinary problem." *Shelby Cnty. v. Holder*, __U.S. __, 133 S. Ct. 2612, 2618, 186 L. Ed. 2d 651 (2013). Section 4 suspended literacy, education, character, and reference qualifications to vote in certain jurisdictions as defined in that section. 42 U.S.C. § 1973b. Under Section 5, no change in voting standard, practice, or procedure could take effect in those jurisdictions without obtaining administrative "preclearance" through the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia that the voting change comports with Section 5. *Shelby Cnty.*, 133 S. Ct. at 2620.

> Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racism in voting, "an insidious and

> pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.* at 334. Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years.

Id. at 2618.

This "extraordinary measure" and "strong medicine" was an appropriate remedy for the century of racially discriminatory voting practices and procedures in the six states originally targeted for preclearance. Successful but time-consuming and costly litigation against state and local practices was routinely evaded by bad faith enactment of new discriminatory laws. The repetitive new laws blunted the Constitution's stated measure for protecting federal rights—the Supremacy Clause and case-by-case adjudication. That history justified freezing voting practices in those jurisdictions, absent advance determination that the changes do not have the purpose or effect of denying or abridging the right to vote on account of race or color. *Id.* at 2618-19, 2624.

The 1975 amendment created new rights for four language minority groups in certain jurisdictions and extended Section 5 preclearance to those jurisdictions,

including Arizona. The 1975 amendment also added the Fourteenth Amendment as a basis for the Act.

Any voting change that had the purpose or effect of diminishing the ability of any citizens of the United States "on account of race or color or in contravention of the [language] guarantees" to elect their preferred candidates of choice, *i.e.*, "retrogression," would not receive preclearance. *See* 42 U.S.C. § 1973c(b). Retrogression requires a comparison of a jurisdiction's new voting plan with its existing plan; the existing plan is the benchmark against which the effect of voting changes is measured. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478, 117 S. Ct. 1491, 137 L. Ed. 2d 730 (1997).

Notwithstanding "the unprecedented nature of these measures," originally intended for only five years, they were extended repeatedly. *Shelby Cnty.*, 133 S. Ct. at 2618. On June 25, 2013, after the trial in this case, the Supreme Court held Section 5's coverage formulas in Section 4(b) no longer constitutional because they had lost rational connection to the circumstances and criteria originally justifying that extraordinary remedy. *Id.* at 2631. But Congress may restore Section 5 by giving Section 4(b) a reasonable application.

B. This Case Must Be Decided in Accordance With Current Law, Under Which Section 5 Is Now Unenforceable

Pending civil cases must be decided in accordance with current law. The Commission relied on maximizing Voting

Rights Act Section 5 preclearance as a legitimate state interest to justify systematic partisan population deviation. Because of *Shelby County*, Section 5 preclearance now cannot be applied in any jurisdiction because the formulas in Section 4 are unconstitutional. Thus, even if Section 5 could justify population inequality before *Shelby County*, it cannot now. To allow the current map to govern successive election cycles until 2020 would give continuing force to Section 5 despite the unconstitutionality of applying it anywhere.

"When [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). The circumstance that Arizona could and did comply with the law at the time—seeking and getting preclearance—does not release it from the rule of law that governs everyone else for future events. If it did, retroactivity would rarely apply.

In some circumstances, however, "a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications," may prevent the new rule from applying retroactively. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759, 115 S. Ct. 1745, 131 L. Ed. 2d 820 (1995). Reliance alone—even reasonable reliance—is generally insufficient to avoid retroactivity. *Id.* at 758-59.

For example, qualified immunity sometimes shields state officers from personal liability under 42 U.S.C. § 1983 and other statutes based on the state of the law at the time of the conduct, even if the law has changed by the time of the adjudication. This exception to retroactivity is animated by "special federal policy concerns related to the imposition of damages liability upon persons holding public office." *Id.* at 758. Those policy concerns are not present here, where the Plaintiffs seek prevention of future government injuries rather than personal money damages for past harm. Qualified immunity has nothing to do with injunction against violating federal rights in the future, even newly announced rights that could not have been anticipated.

There are no "significant policy justifications" or "special circumstance[s]," *id.* at 759, or other reasons to think "the importance of the reliance interests that are disturbed" makes this an "exceptional case[]," *id.* at 761 (Kennedy, J., concurring), dispensing with the general rule of retroactivity. The party urging an exception to retroactivity bears the burden, and here the case for retroactivity is easy. Applying *Shelby County* to this case cannot change the outcomes of elections conducted under the current map. Instead, the only things at stake are future elections. After *Shelby County*, Section 5 has ceased to be a valid justification for unequal population, even if, by hypothesis, it was a valid justification before. The Commission's "reliance" interest here is only the trivial one of not wanting to spend a few weeks finishing the job for which they volunteered. They can shave their boundaries into equality for nothing compared to the

years and millions they are spending to resist doing so. If *Shelby County* is not applied, then Section 5 will continue to dilute votes in Arizona for the next four election cycles of this decade, in disregard of the law that binds us and the rights of hundreds of thousands of voters. For this reason alone, the Commission must revise the current map.

The Court would avoid these clear principles by splitting fine hairs between being constitutional, but nowhere, and being unconstitutional anywhere. The Court bases the difference on invalidation of Section 4(b) coverage formulas in general rather than invalidation of Section 5 as a substantive remedy for any particular jurisdiction. It has long been settled that the extraordinary remedy of preclearance is not intrinsically unconstitutional if extraordinary circumstances justify it. *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). Because *Shelby County* made Section 5 inapplicable everywhere by invalidating the coverage formulas in general, the Supreme Court did not reach as-applied challenges to Section 5 for specific jurisdictions, including Arizona.

It does not distinguish the retroactivity doctrine to say that "the preclearance process" was not invalidated though the coercion to do it was. Slip Op. at 47. Retroactivity does not make it misconduct for a jurisdiction to have complied with Section 5, it just prevents that past conduct from reverberating into the future to the detriment of other people's rights as we now know them to be.

Retroactively stripping the Voting Rights Act cover from the Commission's systematic partisan malapportionment, assuming it was cover before, would not mean all the 2010 maps done in covered jurisdictions "are now invalid." Slip Op. at 48-49. Hopefully few or no other jurisdictions conscripted Section 5 preclearance to work statewide partisan malapportionment. But if any others did, their maps most assuredly "are now invalid" and need to be remedied. That does not cut against the general principle of retroactivity; it is the very reason for it.

C. Voting Rights Act Preclearance Does Not and Could Not Authorize Systematic Population Inequality

If we had power to give continuing effect to Section 5 in deciding this case, on the merits it is further error to give it effect that changes the outcome of this case. Complying with Section 5 and obtaining preclearance under the Voting Rights Act was a legitimate objective in redistricting; indeed, at the time it was mandatory. But the legitimacy of the goal in general has no relation in logic or principle to the validity of using population inequality to get there. A state must "show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions." *Karcher v. Daggett*, 462 U.S. 725, 741, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983) (congressional districting). The reasoning from general validity of complying with the Voting Rights Act to using systematic population inequality to do so is entirely circular. All Section 5 compliance must

be by means that are legal under federal law, and there is nothing but assertion behind the conclusion that the one person, one vote principle is excepted from that.

The Supreme Court has not directly addressed whether systematic population inequality is a legal means of pursuing preclearance. But there is no basis in statutory text, administrative interpretation, or precedent to conclude that Congress purported to authorize state redistricting authorities or the federal executive branch to systematically dilute people's equal voting rights for any reason, least of all as a protection of equal voting rights.

1. At the highest level of generality and within limits, the Constitution "defers to state legislative policies, so long as they are consistent with constitutional norms":

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent[s] . . . . As long as the criteria are nondiscriminatory . these are all legitimate objectives that on a proper showing could justify minor population deviations.

Id. at 740 (congressional districting). This deference respects the state's autonomy of policies where they require accommodation from numerical equality, provided the other conditions are met of nondiscrimination,

consistent application, and consistency with constitutional norms.

But there is no *state* policy in this case, except ironically the equal population policy that prohibits what the Commission has done unless federal law mandates it. There is only the state's duty to federal law under the Supremacy Clause. The Arizona Constitution restates what it need not have said, that Arizona districting must comply with federal law, including the Voting Rights Act. Arizona has made a firm policy choice that does merit federal deference, but it is the choice to forbid inequality except for four reasons not relevant in this case. If Arizona's restatement of its duty to federal law can be called a state policy, it is a state policy that takes its entire content from the substance of the federal law and policy to which it yields. It has no independence from federal policy that could change federal policy to accommodate it.

So we must look to federal law to find what obtaining preclearance requires, permits, and does not permit. The critical question then is whether Congress did and could authorize systematic population inequality to comply with Section 5 preclearance. This case does not turn on whether the Commission had a bad motive of partisan preferment, though it did, or on which motive predominated, though the preclearance motive fell short of covering all the depopulation here. It turns on whether the valid motive of preclearance changes the equal protection calculus for using the means of systematic population inequality to get there. There is no independent state policy of preclearance malapportionment to defer to.

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The Commission and the Court would start and end with the fact that wanting to get Section 5 preclearance is valid. But again, there must be "some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions." *Id.* at 741. They would have federal policy deferring to state policy, state policy deferring to federal policy, and the buck stopping nowhere. We proceed to address whether Section 5 preclearance authorizes systematic population inequality.

2. Nothing in the text of the Voting Rights Act purports to require or authorize population inequality in legislative districting, directly or by implication. *See* 42 U.S.C. § 1973c(a). Section 17 of the Voting Rights Act forbids it in sweeping terms:

> Nothing in subchapters I-A to I-C of this chapter shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

42 U.S.C. § 1973n. Distorting the weight of all the votes in 60% of the legislative districts in Arizona would plainly "impair, or otherwise adversely affect" half of the voters in those districts. It is hard to think of more comprehensive language to exclude systematic vote dilution as a required or permitted means to comply with the Voting Rights Act. The Act must be honored, but with the other available tools that do not steal from some voters to give to others.

3. There is conclusive proof that Section 5 non-retrogression and preclearance yield to population equality. We have in real life what would be a perfect experiment if designed for a laboratory. In covered states, preclearance is also required for congressional redistricting and is given despite near perfect equality of population in every instance. The Department of Justice knows how to accommodate non-retrogression goals for protected minorities with population equality.

4. The blunt fact is that the Department of Justice has never required unequal population for preclearance in the 48 years of administering Section 5. Although the Attorney General must state the reasons for interposing an objection, 28 C.F.R. § 51.44(a), the Commission's expert witness had no knowledge of the Department of Justice ever denying preclearance for lack of population deviation or otherwise communicating that it would be required to obtain preclearance. If the Attorney General had ever done so, it is unbelievable that it would be unknown in the intensely scrutinized world of Voting Rights Act compliance. The Commission does not contend the Attorney General ever did so.

5. Nor does the Constitution grant Congress power to enact legislation requiring or permitting population inequality among voting districts. The Fourteenth and Fifteenth Amendments grant Congress power to enforce by "appropriate legislation," which must be "plainly adapted" to the end of enforcing equal protection of the laws or preventing abridgement of the right to vote on account of race, consistent with "the letter and spirit of

the constitution." *Katzenbach v. Morgan*, 384 U.S. 641, 650-51, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966). "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The right to vote "includes the right to have the vote counted at full value without dilution or discount." *Id.* at 555 n.29 (quoting with approval *South v. Peters*, 339 U.S. 276, 279, 70 S. Ct. 641, 94 L. Ed. 834 (1950) (Douglas, J., dissenting)). Further,

> The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

Gray v. Sanders, 372 U.S. 368, 381, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963). If Section 5 permits otherwise unconstitutional numerical vote dilution, it exceeds Congress's power to enforce the Fourteenth and Fifteenth Amendments' commands of equal voting rights.

Congress's inability to mandate systematic population inequality would not invalidate every preclearance effort with any population deviation. That would not arise because other legitimate purposes for deviation will always come into play. This case is in court precisely because the extent of the preclearance/malapportionment deviation outruns all others and must be defended on its own.

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Statutory text, constitutional boundaries, and a half-century of administration without exception are all the same. They take all seriousness out of the Commission's wild speculation that it can race to the bottom of population inequality to get preclearance. Sources that lack the effect of law could not count against this, but even those sources confirm this conclusion.

6. In its Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, which explicitly "is not legally binding," the Department of Justice stated:

> Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle.

76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). The Department has also acknowledged the obvious, that compliance with constitutional equal population requirements could result in unavoidable retrogression. Long ago the Department stated:

> Similarly, in the redistricting context, there may be instances occasioned by demographic changes in which reductions of minority percentages in single-member districts are unavoidable, even though "retrogressive," *i.e.*, districts where compliance with the one person, one vote standard necessitates the reduction of minority voting strength.

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Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (Jan. 6, 1987). The current Guidance is to the same effect. 76 Fed. Reg. at 7472. This concession to demographic change, where it happens, is dictated by the text of Section 5 itself, which does not forbid all retrogression in the minority's "ability to elect their preferred candidates of choice" as some of the Commissioners and their advisors unqualifiedly and repeatedly said. Rather, to deny preclearance the text also requires that the retrogression be "on account of race or color or in contravention of the [language] guarantees." The "on account of" language was necessary to keep Section 5 validly within Congress's enforcement power. But whether or not it is constitutionally necessary, it is there. Retrogression because of relative population changes is not on account of race or language.

7. The Court puts some weight on an "implication" in the Guidance that the Attorney General "might" require "slightly greater population deviation" to avoid retrogression. Slip Op. at 46. The Guidance notes that an alternative congressional plan with any increase in population deviation "is not considered a reasonable alternative" to a submitted plan. The Guidance continues:

> For state legislative and local redistricting, a plan that would require significantly greater overall population deviations is not considered a reasonable alternative.

76 Fed. Reg. at 7472.

From this statement that a "significant" additional deviation would not be required, the Court infers that a deviation that is *not* "significant" "might" be required. Supposing that is persuasive, the "slightly greater population deviation" that is not "significant" could not possibly support the Commission's stampede to the limits of population deviation. "Significant" population deviation that "is not considered a reasonable alternative" certainly would include any deviation that would change a plan from what is otherwise legal to otherwise illegal. That is the meaning of "significant" in usual legal discourse.

The Court next equates "not significant" with "minor population deviations," the technical term meaning below the 10% burden-shifting boundary. Falling below 10% does not make population deviations constitutionally insignificant. It just changes who has the burden of proof.

8. There is much confusion in this case over whether the Commission tried to make too many Voting Rights Act districts. Federal law does not limit a jurisdiction to creating only the number of such districts needed to avoid retrogression. A jurisdiction may seek a margin of safety or go entirely beyond the Voting Rights Act if it thinks it good policy and complies with state and federal law. A court does not second guess how many such districts are needed or permitted because any number is permitted *if legal means are used to create them.* But choosing to create such districts gives no absolution to use any districting practice that is otherwise illegal. No matter how many or few majority-minority, minority-influence, or cross-over districts a jurisdiction tries to create,

systematic population inequality is an illegal means to get there.

9. This part of the discussion returns to where it began. The Commission's assertion that preclearance was a legitimate redistricting goal at the time is correct and undisputed. But that proves nothing. What needs to be proved is that systematic population inequality that is otherwise irrational and discriminatory is a reasonable means to obtain preclearance, so as to count against the baseline force of equality under the Equal Protection Clause.

It begs the question to say population inequality is "compliance with a federal law concerning voting rights" without demonstrating that the meaning and effect of that federal law is to permit systematic population inequality. Slip Op. at 44. The Court circles its reasoning twice in finding the importance of preclearance in general comparable to that of some valid state purposes for deviation, but sliding past what means are legal and what effect the Act has. It is no answer to say, "The question is not whether the Voting Rights Act *specifically* authorizes population deviations . " Slip Op. at 45 (emphasis added). A statute does not have to "specifically" prohibit something if it generally prohibits it or it does not as a whole have the effect of legalizing what is otherwise illegal.

Federal equal protection doctrine is the gatekeeper for what are permissible state purposes for deviation. Those state purposes need not be codified in state statutes. But there is no independent state purpose here, only

respect for federal law and the Supremacy Clause. This is a case of first impression in another way, as it is the first time systematic malapportionment has been defended from the effect of a federal statute. The dispensing effect must come from that federal statute, expressly, generally, or by implication, or the defense fails. It has nothing to do with whether truly independent state purposes are codified in statutes.

IV. MIXED VALID AND INVALID PURPOSES

Because the majority finds the Voting Rights Act a legitimate reason for population inequality, they must decide what to make of one permitted and one possibly forbidden purpose. They propose different tests. For Judge Clifton the case turns on which consideration predominated. For Judge Silver the impermissible motive has no legal consequence unless it was the only motive. Both tests are trying to grapple with the problems of not diminishing other actual and valid purposes and not yielding to theoretically valid purposes that are only pretext.

Both tests would need to be refined to work. Mixed motives often have no predominance. Some motives are from different domains and incapable of quantitative comparison. A test of predominance of motives is subjective and unreviewable. It disguises judicial choice. Literally, a test of single motive can never be met, not in this kind of case, as covered jurisdictions must be motivated by Section 5 compliance.

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There is a better statement of the test for cases of concurrent valid and invalid purposes. The law should defer to state districting authorities' actual, substantial, and honest pursuit of a legitimate means for a legitimate purpose with systematic population inequality, notwithstanding the actual and additional motive of party preferment. But the valid motive must fairly cover the entirety of the otherwise wrongful inequality. Even a valid means may not pass from reasonable application to pretext in any part. Here the Commission continued adjusting the map with an eye to depopulation for party advantage even after the cover of the Voting Rights Act played out. If the Commission's first acts of depopulation had the cover, the last acts did not. In light of the intervening invalidation of Section 5 preclearance, if sent back for any reason to be redone in any part, the Commission could not do again what it did here.

The difficulty of forming and applying any test for mixed motives shows why it should be left for a case in which it would matter. It is not needed to decide this case, where neither motive justifies systematic partisan malapportionment.

V. OTHER MATTERS

The other opinions run in directions that cannot be responded to in every respect without prolonging this dissent. The matters already addressed are enough to decide this case. Brief additional comments follow.

Appendix D

1. The Court says that "Counsel's advice does not insulate the Commission from liability, but it is probative of the Commission's intent." Slip Op. at 52. To that end, the Court concludes that the systematic population deviation was the result of "reasonable, good-faith efforts to comply with the Voting Rights Act" and that "the Commission's attorneys gave reasonable advice as to how to pursue what they identified as a legitimate objective, and the Commission appeared to act in accordance with that advice." Slip Op. at 1, 52. Counsel did not give advice that underpopulation for preclearance would thereby escape liability under the one person, one vote principle. If their advice could be stretched to have said that, it would not be reasonable.

The Attorney General does not—and indeed, under his statutory authority could not—deny preclearance for any illegality except Section 5 retrogression. The Guidance says:

> The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person, one-vote principle, on the grounds that it violates *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1983), or on the grounds that it violates Section 2 of the Voting Rights Act. . . . Therefore, jurisdictions should not regard a determination of compliance with Section 5 as preventing subsequent legal challenges to that plan under other statutes by the Department of Justice or by private plaintiffs. 42 U.S.C. 1973c(a); 28 CFR 51.49.

Appendix D

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7470 (Feb. 9, 2011). In the teeth of this explicit disclaimer that the Attorney General does not examine inequality of population and gives no protection against future challenge for it, any advice that unequal population is immunized from later challenge if it might help persuade the Attorney General to preclear would be unreasonable.

The Commission began with correct advice that any population deviation must be justified under federal constitutional standards and that no legal precedent said Section 5 preclearance justified any inequality or how much. Their counsel informed them the question lacked a reliable answer and whatever they did must survive scrutiny if scrutiny came. (Trial Ex. 361 at 11-14; Trial Tr. at 826:6-15.) Later, the advisors offered pragmatic license but never circled back to actual legal analysis from sources and reasoning. (Trial Ex. 395 at 114-16, 118-20; Trial Ex. 405 at 10-11, 14-15, 19, 30, 32, 36, 50.) They gave bare conclusions, no principled exposition, and no written opinion.

At best this was advice to take a legal risk, which lawyers often counsel when there is possible benefit and no cost to their client from being wrong. It could be taken as advice that the course of action complied with one person, one vote principles only by not taking it as a whole, which would not be reasonable.

2. Both opinions contend that the Republican commissioners really approved the partisan inequality in

the final plan they voted against because they had voted for some earlier changes that moved in that direction. The Court leaves out the facts that refute it. The Republican commissioners explained their voting for iterations of the map. Commissioners Freeman and Stertz objected to map changes that promoted Democratic Party advantage without justification. (*See, e.g.*, Trial Ex. 405 at 30:18-31:8; Trial Ex. 406 at 240:21.) The minutes from the public hearings and the Republican commissioners' trial testimony explain that Commissioner Stertz voted for the final tentative legislative map to stave off an attempt by Commissioner Herrera to introduce a "more extreme map" to favor Democratic Party interests that they thought was already prepared. (Trial Tr. at 261:10-15, 877:17-879:8; Trial Ex. 406 at 266:14-267:3.) The inference that, though voting against the final plan, the Republican commissioners actually accepted the plan because they did not protest at every opportunity throughout the meetings misses how people disagree in collective bodies if they hope for compromise later. Concurring Op. at 14.

3. In the Final Pretrial Order the Plaintiffs stated "unjustified population deviations in legislative districting for the sole purpose of partisanship" as their claim, but they elaborated it and then summarized as follows:

Accordingly, Plaintiffs must prove (A) the legislative districts deviate from equality, (B) the adjustments the Arizona Constitution authorized did not cause the deviations from strict equality, (C) deviations from equality are not the incidental result of adjustments made to attain legitimate state interests, and (D) no legitimate

State interests justify or warrant the IRC's deviations from equality.

Their Trial Brief said the same thing: "Thus, Plaintiffs are bound to prove only that no legitimate and constitutional policy drove the population deviations." The Plaintiffs tried and proved that. This is the answer to the concurring Judge's concern that she is "not aware of any clear request by plaintiffs that we adopt something other than the 'actual and sole' reason standard." Concurring Op. at 10. It is in the quoted passages, and elsewhere.

4. I join in the sections of the Per Curiam Opinion concerning dismissal of the individual commissioners, dismissal of the state law claims, denial of abstention, and legislative privilege. On the merits, the facts and findings in this dissent are sufficient to dispose of this case. Though I accept most of the factual narrative in the Opinion, I disagree with some, including some that matters under the Court's analysis. The facts that determine the outcome under the analysis in this dissent are few, simple, and, I believe, undisputed. Therefore, I join only in sections III.A, B, and C of the Opinion.

VI. PERSPECTIVE

This dissent applies voting rights equal protection doctrine as it has been settled for half a century. Deference to reasonable state policies begins the analysis, but deference stops where the state policy or its application is irrational or discriminatory. Systematic numerical inequality for partisan benefit is discriminatory and invidious viewpoint punishment or reward.

Appendix D

The first thing novel about this case is that, thanks to the reform of redistricting processes and standards in Arizona, state law itself now excludes most of the traditional pretexts for partisan inequality. Of necessity, the Commission summons up only the Voting Rights Act as redeeming what is otherwise old-fashioned partisan malapportionment.

The second thing novel about this case is that, the Arizona voters having cast out that grossest of redistricting abuses, a *federal* law is now invoked to bless its return. No other instance is found in which Congress is said to have ordered or permitted systematic population inequality that otherwise violates the Equal Protection Clause.

The third thing novel about this decision is the effect it has to give to the Voting Rights Act itself. Assuming we could give Section 5 preclearance continuing reach into the future, it would be extraordinary that Congress used a law protecting equality of voting rights to authorize systematic partisan malapportionment, even defeating state law that prohibits it.

Systematic malapportionment is an affront to the rights and dignity of the individual. The essential empowerments for that abuse are unaccountable discretion and ready pretexts to cover true motives. Population equality is the most objective limitation on abusable discretion, and it cannot be used unfairly against anyone. "[T]he equal-population principle remains the only clear limitation on improper districting practices, and we

must be careful not to dilute its strength." *Cox v. Larios*, 542 U.S. 947, 949-50, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004) (Stevens, J., concurring in summary affirmance).

Numeric equality yields to some other worthy goals, within limits. Arizona voters left little to weigh against equality, and none of what they did allow is invoked here except homage to the Supremacy Clause. With that wedge the Commission pries pervasive party malapportionment back into Arizona, in the name of Congress and federal statute. It is a misplaced sense of federalism that stands aside while officers of a state that repudiated partisan malapportionment return to it on federal command that Congress never gave.

VII. CONCLUSION

Based on these findings of fact and conclusions of law, I would enter judgment for the Plaintiffs declaring that the Arizona Independent Redistricting Commission's legislative redistricting plan violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. I would enjoin the Commission to promptly prepare and promulgate a plan that is free of that error.

Dated: April 29, 2014.

/s/ Neil V. Wake
Neil V. Wake
United States District Judge

APPENDIX E — ARIZONA STATE LEGISLATURE, FIFTY-FIRST LEGISLATURE, SECOND REGULAR SESSION

Arizona State Legislature

Fifty-first Legislature - Second Regular Session

1. Senate; house of representatives; members; special session upon petition of members; congressional and legislative boundaries; citizen commissions

Section 1. (1) The senate shall be composed of one member elected from each of the thirty legislative districts established pursuant to this section.

The house of representatives shall be composed of two members elected from each of the thirty legislative districts established pursuant to this section.

(2) Upon the presentation to the governor of a petition bearing the signatures of not less than two-thirds of the members of each house, requesting a special session of the legislature and designating the date of convening, the governor shall promptly call a special session to assemble on the date specified. At a special session so called the subjects which may be considered by the legislature shall not be limited.

(3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside

in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

(4) The commission on appellate court appointments shall nominate candidates for appointment to the independent redistricting commission, except that, if a politically balanced commission exists whose members are nominated by the commission on appellate court appointments and whose regular duties relate to the elective process, the commission on appellate court appointments may delegate to such existing commission (hereinafter called the commission on appellate court appointments' designee) the duty of nominating members for the independent redistricting commission, and all other duties assigned to the commission on appellate court appointments in this section.

(5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with ten nominees from each of the two largest political parties in Arizona based

on party registration, and five who are not registered with either of the two largest political parties in Arizona.

(6) Appointments to the independent redistricting commission shall be made in the order set forth below. No later than January 31 of years ending in one, the highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate. Each such official shall have a seven-day period in which to make an appointment. Any official who fails to make an appointment within the specified time period will forfeit the appointment privilege. In the event that there are two or more minority parties within the house or the senate, the leader of the largest minority party by statewide party registration shall make the appointment.

(7) Any vacancy in the above four independent redistricting commission positions remaining as of March 1 of a year ending in one shall be filled from the pool of nominees by the commission on appellate court appointments or its designee. The appointing body shall strive for political balance and fairness.

(8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be registered with any party already represented on the independent redistricting commission and who shall serve as chair. If the four commissioners fail to appoint a fifth member within fifteen days, the commission on appellate court appointments or

its designee, striving for political balance and fairness, shall appoint a fifth member from the nomination pool, who shall serve as chair.

(9) The five commissioners shall then select by majority vote one of their members to serve as vice-chair.

(10) After having been served written notice and provided with an opportunity for a response, a member of the independent redistricting commission may be removed by the governor, with the concurrence of two-thirds of the senate, for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.

(11) If a commissioner or chair does not complete the term of office for any reason, the commission on appellate court appointments or its designee shall nominate a pool of three candidates within the first thirty days after the vacancy occurs. The nominees shall be of the same political party or status as was the member who vacated the office at the time of his or her appointment, and the appointment other than the chair shall be made by the current holder of the office designated to make the original appointment. The appointment of a new chair shall be made by the remaining commissioners. If the appointment of a replacement commissioner or chair is not made within fourteen days following the presentation of the nominees, the commission on appellate court appointments or its designee shall make the appointment, striving for political balance and fairness. The newly appointed commissioner shall serve out the remainder of the original term.

(12) Three commissioners, including the chair or vice-chair, constitute a quorum. Three or more affirmative votes are required for any official action. Where a quorum is present, the independent redistricting commission shall

conduct business in meetings open to the public, with 48 or more hours public notice provided.

(13) A commissioner, during the commissioner's term of office and for three years thereafter, shall be ineligible for Arizona public office or for registration as a paid lobbyist.

(14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below:

A. Districts shall comply with the United States Constitution and the United States voting rights act;

B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;

C. Districts shall be geographically compact and contiguous to the extent practicable;

D. District boundaries shall respect communities of interest to the extent practicable;

E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;

F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

(15) Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.

(16) The independent redistricting commission shall advertise a draft map of congressional districts and a draft map of legislative districts to the public for comment, which comment shall be taken for at least thirty days. Either or both bodies of the legislature may act within this period to make recommendations to the independent redistricting commission by memorial or by minority report, which recommendations shall be considered by the independent redistricting commission. The independent redistricting commission shall then establish final district boundaries.

(17) The provisions regarding this section are self-executing. The independent redistricting commission shall certify to the secretary of state the establishment of congressional and legislative districts.

(18) Upon approval of this amendment, the department of administration or its successor shall make adequate office space available for the independent redistricting commission. The treasurer of the state shall make $6,000,000 available for the work of the independent redistricting commission pursuant to the year 2000 census. Unused monies shall be returned to the state's general fund. In years ending in eight or nine after the year 2001, the department of administration or its successor shall submit to the legislature a recommendation for an appropriation for adequate redistricting expenses and shall make available adequate office space for the operation of the independent redistricting commission. The legislature shall make the necessary appropriations by a majority vote.

(19) The independent redistricting commission, with fiscal oversight from the department of administration or its successor, shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation.

(20) The independent redistricting commission shall have standing in legal actions regarding the redistricting plan and the adequacy of resources provided for the operation of the independent redistricting commission. The independent redistricting commission shall have sole authority to determine whether the Arizona attorney general or counsel hired or selected by the independent redistricting commission shall represent the people of Arizona in the legal defense of a redistricting plan.

(21) Members of the independent redistricting commission are eligible for reimbursement of expenses pursuant to law, and a member's residence is deemed to be the member's post of duty for purposes of reimbursement of expenses.

(22) Employees of the department of administration or its successor shall not influence or attempt to influence the district-mapping decisions of the independent redistricting commission.

(23) Each commissioner's duties established by this section expire upon the appointment of the first member of the next redistricting commission. The independent redistricting commission shall not meet or incur expenses after the redistricting plan is completed, except if litigation or any government approval of the plan is pending, or to revise districts if required by court decisions or if the number of congressional or legislative districts is changed.

APPENDIX F — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, DATED MARCH 25, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CV-12-00894-ROS-NVW-RRC

WESLEY W. HARRIS, qualified elector of the State of Arizona, *et al.*,

Plaintiffs,

vs.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Defendants.

Phoenix, Arizona
March 25, 2013
8:32 a.m.

BEFORE: THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE
THE HONORABLE NEIL V. WAKE, JUDGE
THE HONORABLE RICHARD R. CLIFTON, JUDGE

Appendix F

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

BENCH TRIAL

***

[Examination by David J. Cantelme]

[Witness: Richard Stertz]

[138]Q. Did the Commission receive any advice in public session during phase two from the mapping consultant or from counsel about the need, if any, to conduct a racial bloc voting analysis to construct the voting rights districts?

A. Well, the voter rights polarization analysis was a discussion point of expectation.

Q. Meaning?

A. Meaning that we were always in anticipation of getting that product. There was a desire to not do that work product until after the draft maps were completed. So we were using, recommended by legal counsel, what we called the Cruz Test, which was the Mining Inspector Test. The Mining Inspector Test was that in the previous statewide election, there was a — it's a — it's one of the few statewide elections where sort of [139]no one knows who the person is or why — what their role is and everyone votes for them. In this case, the Democrat had a Hispanic surname and the Republican had an Anglo surname. And that balance in that analysis assisted the Commission by virtue of the

fact that during this time we only had data sets from the 2008 and the 2010 election. We did not have the data sets from 2004 and 2006, so it gave us very little to go off of as far as moving the maps forward.

So we were using whatever data that we had available that our consultant was able to provide for us during that time frame to use as a governor to be able to see whether or not the maps were going to be able to meet the test that would hit our benchmarks.

Q. Am I correct to say, then, that at that point, the metric to determine compliance with the Voting Rights Act was the so-called Cruz Index?

A. Yes.

Q. And that's named after candidate Cruz who was a candidate for the mine inspector slot in the 2010 election?

A. Yes.

Q. How do we know whether that metric truly measured the minority-preferred candidate or simply measured the strength of Mr. Cruz as a Democrat candidate?

MR. CAMPBELL: Objection. Leading.

CHIEF JUDGE SILVER: Overruled.

[140]THE WITNESS: I have got no way of testing it one way or the other. It was the only method that we had, because we had — there was not a consultant that was on board that would be able to provide us this ongoing data analysis.

***

Q. Back to Dr. King. Now, Dr. King ultimately was the individual who performed that racial bloc voting analysis. True?

A. Yes.

Q. When did Dr. King get hired?

A. Late. Late on in the process.

Q. He didn't really start his work until after the draft maps were prepared. True?

[141]A. I'd have to look back at the actual dates and schedule, but we didn't get our — my recollection is that on January 9th of 2012 is when we received the final analysis from Dr. King.

Q. All right. I'm jumping ahead. But he did make — presentation on his work was made on November 29?

A. Preliminary analysis, yes.

Q. His preliminary analysis. We're going to get to that in detail. But I want to establish the fact that during the draft phase you did not have Dr. King's input?

A. No, we did not, nor any other expert.

***

[143]Q. Communities of interest, was any definition of the term "communities of interest" ever adopted by the Commission?

A. No.

Q. How would the Commission then know whether any particular plan was, in fact, respecting or not respecting communities of interest?

A. We did not have a test to measure and the decision was arbitrary.

Q. Let's talk about competitiveness. Was any definition of competitiveness ever adopted by the Commission?

[144]A. Not any one specific competitiveness index was ever created.

Q. At some point, metrics were developed, were they not?

A. Yes.

Q. Those metrics evolved and became more sophisticated over time?

A. They became sophisticated over time because the first three measures of competitiveness did not include any of the 2004 and 2006 election results. So over the course of time we developed over nine — I believe there's a total of nine different competitiveness indices, and they all were based on different data sets that were put into them. Not one of those were developed or — pardon me — not one of those were approved as a given competitiveness index. They were — they evolved over the course of the Commission's work.

Q. How would we know, then, whether any given iteration was more competitive than any other given iteration?

A. Each indices, each index, had different results based on the data sets that were put into it. For example, if one index did not include the outline election results, for example, there was a race where Senator McCain ran for all intents and purposes unopposed, so it would skew the results. And if it was weighted too heavily for — if that election would have been included it would have skewed the outcome of whether or not competitiveness would have existed.

[145]There was never an algorithm developed that defined actual data that went into each one of the indexes. It was a general set of percentages that were used in each index and those indexes could be used sort of at will at the desire of any one of the commissioners to be used to study

to see which particular district may or may not fall into a competitive — be considered to be competitive.

Q. With no algorithm having been developed, and with the multiplicity of indices, how would the Commission be able to determine the competitiveness of any map iteration other than an I-know-it-when-I-see-it type of standard?

A. There would be no other way of doing it other than to use a know-it-when-I-see-it.

***

[147]Q. Do we know how many competitive districts your Commission drew?

A. No, because there was no metric. There was no definition of competitiveness.

***

Q. How would we know, then, whether the criterion of competitiveness drove the adoption of any particular iteration?

A. You would not.

Q. Okay. I want to talk to you about compactness for a moment. That is one of the criteria in the State — in Prop 106. True?

A. Yes.

Q. Did the Commission ever adopt a definition of the term "compactness"?

A. We adopted — we didn't adopt, but we accepted three premise for compactness: One was what's called the Roeck Test; [148] the other is the Popper-Polsby Test; and the other is the Perimeter Test. Each one of them look at the — either measuring from the inside of a district out, from the outside of the district in, or the perimeter of the district itself.

Because Arizona has small centers of population and large real estate, we, as a Commission, used those three as measuring governors. But more so we looked at if it just didn't look right, it probably wasn't, sort of test as our sort of adopted measure.

***

[150]Q. Now, to come back to the legislative map and how we got to what became adopted as the draft map, have you heard the term merge map?

A. Yes.

Q. Explain to us what that means, please, in this context.

A. Commissioner Freeman and Commissioner McNulty had been working together to each work on a legislative map. At the direction of the Chair, the Chair requested that Commissioner Freeman work on the northern part of Arizona and Commissioner McNulty work on the southern

part of Arizona and then merge [151]those maps together for the legislative maps.

Q. Is that how it actually took place, to your knowledge?

A. It started that way but it did not end that way.

Q. How did it end?

A. The majority of the work product as Commissioner Freeman had put forth did not show up in the final approved draft map.

Q. Whose work product did show up in it?

A. The majority of that was Commissioner McNulty's.

Q. So Commissioner McNulty went beyond drawing just the southern Arizona districts?

A. Yes.

Q. Can you say then whether the concept of merge map between McNulty and Freeman actually played out?

MR. CAMPBELL. Objection. Leading.

CHIEF JUDGE SILVER: Overruled. And let me just say something now, Mr. Campbell. You have, without a doubt, demonstrated your prowess in identifying leading objections but Mr. Cantelme has demonstrated his prowess in overcoming my sustaining those objections. So

you have both met the mark on evidence jeopardy. What I'm going to do from this point forward, however, is I'm going to overrule those objections unless the question is highly prejudicial.

MR. CANTELME: Thank you, Your Honor.

BY MR. CANTELME:

Q. Let me restate it.

[152]A. Please.

Q. Because I have forgotten exactly how I put it so I will do it all over again.

CHIEF JUDGE SILVER: Whatever it was, it was leading.

JUDGE CLIFTON: Just say yes, and that's the end of it.

BY MR. CANTELME:

Q. Okay. It was along these lines: If the concept of the merge map was to put Freeman in northern Arizona and McNulty in southern Arizona, that's not really what happened, was it?

A. No.

Q. What actually happened?

A. The merge map was a — the majority of Freeman's map lines did not make it into the final map.

***

[176]Q. Well, I will go about it this way then.

You will see in District 19 an increase in HVAP of 0.4 percent?

A. Yes.

Q. How do we know whether that made any difference?

A. It's going to have to be looking backwards to see whether or not it made any difference.

Q. So you would look at actual results?

A. Actual results of the 2012 election.

Q. So to speak, the coin of the realm. And you look backwards to see whether a district actually performed?

A. Yes.

Q. Do we know whether District 24 actually performed?

[177]A. As a Hispanic majority-minority district?

Q. Yes.

A. It did not.

Q. You say it did not?

A. No, it did not.

Q. Why do you say that?

A. Because out of 24 and 26, only one of the six members entering the State House, only one of the six is of Hispanic descent.

Q. So the other five elected from 24 and 26 to the State House, non-Hispanic whites?

A. Yes.

***

[182]JUDGE WAKE: Mr. Cantelme, before you go to the next subject, let me ask a question before I forget it.

Mr. Stertz, in the chart we were looking at at the changes to the final map, it looked like — I didn't see all of the map because it was off the screen, but it looked like the majority of the changes reduced the Hispanic voting age population for the districts in question. A few are essentially neutral, and one increased. Is that about right?

THE WITNESS: Yes.

JUDGE WAKE: How does reducing the Hispanic voting age population in the Voting Rights Act districts strengthen the ability to elect for the protected minority?

THE WITNESS: I think that's a fantastic question. I think that there's a couple of things to take into [183] consideration, and that's that in certain blocks we've got, even though there might be a high Hispanic voting age population but no propensity to actually vote. So voting results were also taken into consideration. And even though they are not mapped this way, you might have been able to pick up an area, a precinct, of very active voters that might have given a higher propensity to actually elect, even though in certain districts, where we have that minority and majority protected districts, we have very low turnout.

So my view of reduction to meet benchmarks was always defaulted back to recommendations from the experts to say, we're reducing ln voting age population for Hispanics in that district, but you are saying that it's strengthening the district. I have got to rely on their expertise to be able to say that that makes sense.

JUDGE WAKE: Let me recast the question maybe more sharply in terms of what was or was not said by the commissioners. Do you recall the commissioners stating the reasons for making these changes, most of which resulted in reducing Hispanic voting age population? Did they say reasons, or was it just — well, do you remember?

THE WITNESS: They — it was always the goal to take whatever district it was, to strengthen the district even if it required depopulating the district if the depopulation included reduction of Hispanic voting age population in that area, if it [184]showed in a competitiveness analysis that there would be a higher propensity to elect.

JUDGE WAKE: But what I'm trying to get at is what was given as reasons for changes? I guess all of them are depopulating changes.

THE WITNESS: Yes.

JUDGE WAKE: That how was it explained that changes that reduced the Hispanic voting age population would strengthen the ability to elect? Was that explained by anyone as they made those changes?

THE WITNESS: I have got no recollection of ever hearing a cognitive string of thought that said let's take more Hispanic members out of the community and then that's going to give a greater opportunity for an Hispanic to be elected. If that answers your question.

JUDGE WAKE: Actually, I might understand the logic of it if reducing population resulted in increasing Hispanic voting age population. But what these data show is that most of these reducing the population also reduced the Hispanic voting age population.

THE WITNESS: Yes.

JUDGE WAKE: And I'm trying to figure out what the stated reasons were for how that would improve the ability to elect. And if you are telling me you don't remember —

THE WITNESS: It's not that I don't remember. There [185]was not a string of conversation that led to being able to say, we're going to reduce this and we're going to have a better opportunity.

JUDGE WAKE: It just came down to your consultant said, do this.

THE WITNESS: Yes.

JUDGE WAKE: Take it on faith, or take it on what they gave you.

THE WITNESS: Yes.

* * *

[188]Q. And then we come to registration. And we see in the old iteration the percentage of Republican registration was 36.2 percent, right?

A. Yes.

Q. And we see that it drops to 28.5 percent. True?

A. For Republican registration, yes.

Q. Right. And we see Democrat go the other way, 32.0 percent in the old and goes up to 38.0 percent in the new?

A. Yes.

* * *

[194]Q. And the Commission itself never claimed 8 was a district in which Hispanics could elect their preferred candidate, right?

A. Correct.

Q. Yet with much lower CVAPs it claimed that 24 and 26 could. I find that a little anomalous. Do you also?

[195]A. Yes. 24, 26, and 8 have always been districts that were viewed as an attempt to add a coalition of non-Hispanic whites being the minority where someone that would be a non-Hispanic white would have the opportunity to be elected.

***

Q. "The Benchmark Plan has only six majority-minority districts that provide minority voters the ability to elect their candidates of choice." Right?

A. Yes.

Q. I read that right?

Okay. So if the Commission claimed it created 10 in the enacted plan, that is, nine Hispanic and one Native American, right?

A. Yes.

Q. And you take away 24 and 26, that leaves you with only [196]eight; seven Hispanic and one Native American?

A. Yes.

Q. That's still one better than the Benchmark?

A. Yes.

Q. That being the case, Mr. Stertz, what was all the fuss about districts in 24 and 26 for?

A. During the course of deliberation on 24, 26, and finally 8, 24 and 26, in my opinion, were an attempt to create a — to create districts where we were offloading neighborhoods that were — they became sort of contrived districts in their design, and 8 more so than even 24 and 26. 8, at the last minute, created a line that moved across Interstate 10, split Casa Grande in half, consolidated a large population of the prison population into one particular district which was something that we as a Commission had made a concerted effort early on after hearing many hours of testimony about prison gerrymandering.

And at the very last minute, we have a redesign of 11 and 8 which created a district that had — that was not competitive. It moved Republicans out of District 8, moved them into 11. It touched on edges that took population out of other districts weaken — in my opinion, weakening those, and packed a lot of the prison population in. And

the reason why the prison population is important is that they count in your total population. They count in their ethnicity, yet they are [197]not voting. And, of course, if you are in prison you are over the age of 18 so you are part of the voting age population.

So 8 became a very contrived district that was created at the very end. And there was a lot of contentious testimony between myself and Commissioner McNulty about this of which her argument prevailed on a push vote between Commissioner McNulty, Commissioner Herrera, and Chairwoman Mathis.

In regards to 24 and 26, the majority of that argument I left to Commissioner Freeman, even though we both have got a great amount of experience in both of these neighborhoods. I have done development in all these. I know the area as well. We studied them well. We were trying to — I believe that they ended up becoming a bit contrived, not only in their design, but trying to back fit the story about whether or not they truly had a community of interest.

Now, are they better today than they were when they were first developed in draft maps in design? Yes. Did some of the edges get taken away, were some of the — was there some positive movement in those two districts in how they were designed? Yes. Should they have been part of the overall scheme of trying to convince someone that they were minority-majority districts? I never could grasp that as being why.

However, by virtue of our consultants and our attorneys, they drove the message home that we needed to have [198]10. And these 10 benchmark districts that needed to be created needed to be included, including these coalition districts as they became called. And that's what 24 and 26 became.

Q. So they are telling you you need to get 10, yet they told Department of Justice the benchmark was only 6 and 1. True?

A. True.

***

[Examination by David Cantelme]

[Witness: Richard Stertz taken on re-direct]

[328]Q. Okay. That being the case, you had received advice from counsel, that would be Mr. Adelson, that it was okay to underpopulate districts in order to strengthen them as districts in which minorities could elect their preferred candidates?

A. True.

***

Q. Now, Exhibit 34 is a document entitled Guidance Concerning [329]Redistricting under Section 5 of the Voting Rights Act notice. It's dated February 9, 2011 and

it's published at 76 Federal Register beginning on page 7470.

And what I would like to do on page 515 is go to the lower left-hand corner and highlight for me the paragraph beginning with preventing retrogression. You'll see there, Mr. Stertz, that it reads, quote, preventing retrogression under Section 5 does not require jurisdictions to violate the one person, one vote principle.

Are you with me there?

A. Yes.

Q. Were you ever advised by counsel that the position of the Department of Justice in enforcing Section 5 is that preventing retrogression under Section 5 does not require jurisdictions to violate the one person, one vote principle?

A. Not with any specificity of recollection.

Q. Okay. The notion of underpopulating districts was yours; true?

A. True.

***

[343]Q. All right. And you'll recall that according to Dr. King in his draft analysis, which Mr. Campbell reviewed with you that Cruz, Mr. Cruz, the Mine — the Democrat Mine Inspector candidate in 2010 had received substantial White votes in those two districts; true?

A. True.

Q. Now, here's the clincher, Mr. Stertz. How do we know that those voters were voting for Mr. Cruz because he was Hispanic as opposed to Democrat?

A. We do not.

Q. It's speculation, is it not?

A. It is. That is why Ms. O'Grady coined the phrase "the [344]down and dirty Cruz test," because it was the only way to—it was the easiest way, with the limited data that we had, to be able to do an ongoing analysis.

***

[355]Q. I want to conclude with this, Mr. Stertz. Can you explain to us why this exhibit shows such a partisan skew in overpopulation and underpopulation?

A. I could explain it in a couple of ways.

Q. I want to put it in this context.

A. Yes, please.

Q. The draft map, which we've heard testimony in Dr. King's report, would satisfy Section 5 and it did not have that skew. Using that to set the table, explain please.

Appendix F

A. By virtue of advice from counsel and their consultant subsequent delivery of the Dr. King draft map analysis, it was the opinion of our team that we needed to strengthen the districts. And to strengthen the districts, underpopulating those districts was an acceptable mechanism to do so.

Therefore, to underpopulate those districts, other districts needed to become overpopulated. And by strengthening those districts, you offload Republicans from one district to another; therefore, overpopulating Republican districts and underpopulating the Democrat districts.

***

[Examination by Mary R. O'Grady]

[Witness: William Desmond taken on cross]

[439]Q. Let's look at the mine inspector vote that's added as a column to this particular report.

Does the mine inspector — and the mine inspector candidate that this — this means that 46.1 percent of the people in this configuration of District 8 voted for the mine inspector, correct? Excuse me, the democratic candidate for the mine inspector?

A. This is what we called the Cruz Index. Manny Cruz ran for mine inspector in 2010. It served as a good statewide election for us to have an easy way of, I guess, looking at

what polarized voting would show us when we did further analysis.

Q. But it's not the complete analysis?

A. No, it's just something that's on the fly, a little bit easier for the commissioners to digest. It's a number that's always available.

[440]Q. So here the Hispanic candidate who is also the Democratic candidate would have lost in this district?

A. Correct.

***

[447]JUDGE WAKE: Ms. O'Grady, could I interrupt just a minute?

Do you know whether there's any Arizona Corporation Commission races in — I guess the times to look at would be maybe 2010, 2008? I don't remember off the top of my head.

THE WITNESS: I don't know, to be honest. So errors [448]in the results?

JUDGE WAKE: No. No. I was just thinking about looking for a benchmarks of generic party success that traditionally the Corporation Commission races has been viewed as a low information race. I mean, there is campaigning for it but a race about which people don't

know as much or care as much and so the popular belief is that voters tend to default to their party preference. And so looking at Corporation Commission races is one way to get an idea about what the party default position is. I'm just wondering if there were such races that could have been looked at.

THE WITNESS: I think some of those were studied. I mean, the reason these races were chosen for this portion, I believe, was because this section really just deals with a different Voting Rights Act pieces of information we were curious about. I believe corporation commissioner, as a statewide race, did factor into some of the competitive indexes that were used.

JUDGE WAKE: I'm also thinking that the mine inspector race, did you run comparisons — it might not have been in the same year — of Corporation Commission race to the mine inspector race? Because you would wonder, at least I would wonder, if they came at it about the same, that might suggest that the mine inspector race was just similar to a generic Republican-Democrat race for? Of course, nothing is ever [449]perfect.

But I'm wondering, was that —my question really relates to all of these indexes. Was that looked at?

THE WITNESS: I believe all the election results were looked at, you know, since it was Manny Cruz who ran in 2010 and since mine inspector is a fairly, I think, low interest election as well, the thought was that Hispanic voting for, you know, a Hispanic candidate of choice would probably default there to a Hispanic surname.

JUDGE WAKE: Of course, the thought that just occurred to me now was that if the performance in that race were comparable to the performance in Corporation Commission races that would tend to suggest that that mine inspector race didn't reflect — would not have reflected Hispanic preference but just generic Republican and Democrat.

I don't know. It just occurred to me right now and I was wondering if it was examined to — as a check on the mine inspector race as to whether it really had much indication of ethnic preference for Hispanics compared to generic Republican and Democrat preference.

THE WITNESS: Yeah. No. Because they could both be — people could be voting for the D in front of his name not the last name.

* * *

Appendix F

[Examination by David J. Cantelme]

[Witness: DJ Quinlan taken on direct]

[474]Q. Okay. You met with Commissioner McNulty more than once at her home in Tucson. True?

A. That is correct.

Q. In fact, between the period of the adoption of the grid map

and the adoption of the draft map you met with her as many as five times at home. True?

A. That was what we discussed in my deposition, and I couldn't remember the exact number of times. I do remember it was more than once, and I don't recall it being very many times. So I would say that would be a fair thing to say.

Q. It's fair to say as many as five times?

A. Correct.

Q. And then you met with her again at home during that period between November 29, 2011, and adoption of the final map. True?

A. I'm sorry. To clarify, five times total. I don't -- I can't remember the timeline as to when we were meeting exactly. I believe that would probably make sense, though,

because after the draft map there probably wouldn't have been much map drawing going on.

Q. Let's turn to Page 27, beginning at Line 12 of your [475] transcript.

And I'm going to read you from the transcript and ask you if you gave the answers to the questions recorded in your transcript. Beginning at Page 27, Line 12:

"QUESTION: How many times did you meet with her at home during that period between adoption of the grid map on August 18, 2011, and adoption of the draft map on October 10, 2011?

"ANSWER: I can't recall.

"QUESTION: More than once. Though?

"ANSWER: More than once, but I don't believe it was very many times.

"QUESTION: As many as five?

"ANSWER: Maybe. Maybe as many as five."

You gave those answers to those questions, right?

A. Yes, sir.

Q. Then you met with Commissioner McNulty regarding District 8, true?

A. Specifically regarding District 8?

Q. Yes.

A. I did meet with her and I do remember District 8. I do remember discussing District 8 with her in a general context. I don't remember if that was the only thing we were meeting about.

Q. Page 36, please, Line 21 through 24.

[476]"QUESTION: Okay.

"ANSWER: That's just my recollection of it, though.

"QUESTION: Who initiated the meetings between you and Commissioner McNulty relative to District 8 after the Commission reconvened on November 29, 2011?

"ANSWER: She did."

You gave those answers to those questions. True?

A. I did.

* * *

Appendix F

[Examination by Michael T. Liburdi]

[Witness: Jose Herrerra taken on direct]

[497]Q. Let's shift gears now to the grid map. And when I say "grid map," what is your understanding, briefly, of what we mean by the term grid map?

A. Grid map to me means the map that uses population and it's population divided equally among — equally some squares, if it's 30 for the Legislative, it's 9 for the Congressional.

Q. So let me focus on something that you had just said. So equal population, correct?

A. That's correct, for a grid map, yes.

Q. Is it not the case that the Arizona Constitution requires that the grid map employ equal population in the districts?

A. I believe for the Congressional it is mandatory.

Q. And then what about for the state Legislative side?

A. If I remember correctly, there's some leeway there.

***

[530]Q. Let's now go to Page 114. And let's focus on the statement from Chair Mathis at the end of the page, please.

Would you take a look at that?

A. Okay.

Q. We're missing— seems like we're missing a line, something on this line. At least in my copy it ends with the word "districts."

Do you see on there it says "districts"?

A. I do.

Q. So Chairperson Mathis is asking the propriety of underpopulating majority-minority districts?

A. I believe that's what she's asking.

Q. Now, Mr. Strasma's answer is, quote, "That would be my recommendation," end quote.

A. That's what it says there.

Q. Do you recall this exchange independently right now?

A. Independently, no.

Q. Okay. Now, let's highlight where Chairperson Mathis responds to the end of Mr. Strasma's two-paragraph response. There you go. Why don't you take a look at that.

A. Okay.

Q. And this — you recall this exchange between Chair Mathis [531]and Mr. Strasma where Ms. Mathis asks,

quote, "Is there a rule of thumb at all in terms of how much?"

A. I do not recall.

Q. Nevertheless, Mr. Strasma answers: "I'm going to summarize with the, quote, plus or minus 5 percent," correct?

A. That's what it says there.

Q. Now, that's consistent with what you have heard throughout the Redistricting Commission process from your counsel and your advisors that it was acceptable to underpopulate and overpopulate districts plus or minus 5 percent, correct?

A. I believe the deviation — some deviation was acceptable.

***

Appendix F

[Examination by David J. Cantelme]

[Witness: Thomas Hofeller taken on direct]

[553]Q. What I'd like to do then is turn to, because each of those affidavits reports served a distinct function, I'd like to start with your first, and that, I believe, is Exhibit — I believe it's 39 but it might be 40. Let me look on the list to be sure. 39, please.

A. Yes.

Q. And if we look to the last page of the affidavit, we see that it's dated June 25, 2012. Right?

A. That's correct. Yes.

Q. Now, Dr. Hofeller, I'm not going to go through the entire affidavit, because it's in the record and I'm sure the Court has had an opportunity to read it. What I'd like to do is I'd like to get to the substance of it. The affidavit indicates what you reviewed and all that sort of stuff.

But you reached some conclusions in this affidavit, and I'd like to have you tell us what those conclusions were, and then I will ask you for the basis of them. And for that purpose, what I'd like to do is direct you to Paragraph 17, please.

Would you read that paragraph to yourself, please.

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[554]Tell us what opinion you formed in this paragraph, please. You don't need to read it to us, just summarize it for us.

A. Right. I believe my opinion — well, I know my opinion was that the only logical reason for the underpopulation and overpopulation of the districts was to gain an advantage politically.

Q. Would you explain the bases of that opinion, please.

A. When I first examined the districts and looked at the deviations, I noted that all of the Republican districts, the districts that had two-party registration with the Republican majority were all overpopulated, save, I believe, one, and that all the Democratic districts with the Democrat plurality in the two-party registration were underpopulated.

Q. In your experience, is that an unusual result in redistricting?

A. Absolutely.

Q. Explain, please.

A. Well, if you look at the graph I provided, the bar chart, you note that there is a skew from the most underpopulated up to the most overpopulated. And the chances of that happening are almost impossible to calculate in terms of it happening according to neutral criteria which Arizona has in its State Constitution.

Q. I have put on ELMO so we can try to pull up Exhibit 40.

[555]A. I don't believe the whole chart is showing.

Q. Jessica, why don't you see if you can pull it up that way.

Okay. We've got the whole chart now on the screen and it's marked as Exhibit 40. Explain how this chart figures into your opinion, please.

A. Well, once again, you see an almost perfect skew of these district deviations from a low of over 4 percent to a high of over 4 percent. And you can see the chart is colored in accordance with the two-party registration with the Democrats being in their now traditional blue and the Republicans being in red. And that this sort of a pattern in a chart is, again, something that could never have come about by chance or by execution of normal neutral state criteria.

Q. What does that then tell you, Dr. Hofeller?

A. Well, that then tells me that there was a conscious effort made to create a plan that had that sort of a skew. It couldn't have come about by the normal redistricting process.

Q. It happened as a result of design then, true?

A. Yes, it did.

***

[556]Q. Now, when we say minority districts, these are the districts that the Commission has said are those in which a protected group has the ability to elect its preferred candidate?

A. Yes. Although I would say that 9, for instance, which is one of them, is barely over zero percent.

Q. Okay.

A. So it's a prevailing pattern.

Q. What's the significance of this chart then?

A. Well, I think this demonstrates what we all know, and that was that the Commission was following a policy of underpopulating minority districts. And it's just demonstrated in this chart.

Q. The correlation there is too striking to be anything caused by accident or randomness?

A. Well, I wouldn't account it to randomness at all. I would account it to a deliberate policy. But, of course, now, in studying the other evidence involved in the case, I know this to be the fact.

***

[563] Q. Okay. Let's continue then to District 24.

A. Yes.

Q. You have got a deviation of only 127 individuals?

A. Yes.

Q. What is the non-Hispanic white voting age population in that district?

A. It's 62.34.

Q. Now, in that district, the Commission did not achieve 50 percent plus 1 minority voting age population. True?

[564] A. Well, I think that's a little bit of an apples and oranges.

Q. Straighten me out, please.

A. Okay. The minority voting age population there would be about 38 percent, I believe. And I'd have to look at all the charts, but I don't recall, because the Commission actually handled that district a lot differently than I handled it in my plan.

Q. Why the difference?

A. Well, the difference is because I didn't believe that it was a Hispanic district, and the way the plan was constructed, some of the Hispanic population in District 24 was drawn out into the other Hispanic districts to bring them up to population so that they would meet the proper deviation.

Q. Now Dr. Hofeller, District 26 has got similar problems. True?

A. That's true.

Q. Now, as you have drawn District 26 in plan X, it's only got 183 individuals below perfect?

A. That's true.

Q. What about the non-Hispanic white population? What do you have there?

A. 56.70.

Q. How does that compare with the Commission?

A. I believe the Commission's non-Hispanic white population is less, but again, I'd have to see the two charts to compare [565] them.

Q. All right. Now, you will recall from Mr. Stertz's testimony when I reviewed with him the Commission's DOJ submission for preclearance dated February 28, 2012, you will recall that we established that citizen voting age population in Districts 24 and 26 was just about 20 percent or a little bit under, right?

A. Yes.

* * *

[594]Q. Now, Dr. Hofeller, I took calculus back in 1974 I think and I've forgotten every bit of it. I don't even know if we would have covered this issue. So I'm going to try to put this into layperson terms and you tell me if I have it right.

One of the things you are focusing on here is not just whether there are deviations but the magnitude of those deviations. Have I said that fairly?

A. Well, that's one aspect, yes. It's the magnitude.

Q. And the distribution of the deviations within levels of magnitude. Have I said that right?

A. The distribution among the parties and also the distribution of the demographics.

Q. And I'm getting the sense that if that magnitude is greater, that means that it is less likely that the intent was simply to draw, according to the neutral criteria, and had deviations be the incidental by-product?

A. I think that's true but also I would say that, again, the [595]distribution of the demographic and political factors among those deviations would also have been expected to have been different.

***

[600]JUDGE WAKE: Dr. Hofeller, if one puts aside the Voting Rights Act compliance issues in this case and

just looks at the constitutional factors to be considered, I would like to ask you whether those factors — those are county and city splits, communities of interest, respecting geographical features, compactness, and contiguity. Are those factors — each of those factors could reasonably result in population disparity off of the ideal; correct?

THE WITNESS: Your Honor, they certainly could result [601]in population deviations off the ideal. But nowhere near to the extent that the AIRC's plan did. If you look at my Plan X, you'll see that it honors counties, it honors cities and towns. So if the AIRC took, for instance, as a goal to stay within two percent or even one percent, in my opinion, they would not have had — they would have been able to accomplish all of the goals in the Arizona State Constitution as I believe did the last Commission.

JUDGE WAKE: Well, suppose that they did lead to population disparity. Is there a statistical reason to think that the skewing of those population disparities would run almost entirely in favor of one party and almost entirely against another party as to those neutral factors?

THE WITNESS: I would find it inconceivable that that could happen if one were just looking at the neutral factors.

MR. CANTELME: And just taking one at a time, respecting county and city boundaries, is that a factor that if one could statistically expect a result in six out of eight underpopulated districts being one party and a similar number on the other side for —

THE WITNESS: No, Your Honor.

JUDGE WAKE: And how about for respecting communities of interest, same question?

THE WITNESS: Well, then again, community of interest is sort of an overlap with cities and towns. One of the [602]problems we have, and I had in reading through the record and listening to what went on in the courtroom already, has just reinforced my conclusion that community of interest is a very nebulous term which means different things to different people and you'll always have to ask the question of whose community and whose interest is involved. So –

JUDGE WAKE: My question is whether — however one variously defined communities of interest, could one expect that it would statistically turn out that almost all of the underpopulated would be in one property if you are just looking at community of interest figures?

THE WITNESS: No.

JUDGE WAKE: And the same for compactness and contiguity?

THE WITNESS: Well, definitely absolute contiguity wouldn't really play in at all but compactness would not require population deviations really at all. The change in compactness from moving the AIRC's plan to almost serial deviation would be minimal.

JUDGE WAKE: All right. Thank you.

JUDGE CLIFTON: Let me follow on a question that was suggested by one of Judge Wake's questions that has to do with splitting or adhering to the political boundaries of the state, counties and cities and so forth. Your report contains a paragraph which you just talked about, paragraph 19, with [603]regard to your analysis of the Commission's plan. Did you do a similar analysis for the plan — your Plan X?

THE WITNESS: Yes. I ran a split report for my plan and —

JUDGE CLIFTON: Is that contained in your affidavit report? I may have missed it.

THE WITNESS: I don't recall, Your Honor. I'm not sure that it did.

JUDGE CLIFTON: Is there anything that tells us that your report is as good as or superior to the Commission's plan?

THE WITNESS: I think that comparison could be made visually, yes. But my recollection is that it is better. But I don't think that that is in the report. I just don't recall.

JUDGE WAKE: I have a follow-up on that. In terms of city and county splits, some of those are absolutely mathematically necessary; correct?

THE WITNESS: Well, yes, they are because, for instance, a city such as Phoenix exceeds the population of a district. But it doesn't only become a matter of that. It becomes a matter of how many fragments into which a city is split. It isn't just that it's split. If it's less than the district population, it's split five ways and that you're going to look at that and say why did that have to happen under neutral criteria?

JUDGE WAKE: But, did you run a calculation of how [604]many splits were necessary— mathematically unavoidable? I'm not suggesting you need to, or even whether this is routinely done. I'm just wondering. It would seem that there would be a baseline of number of splits that have to happen because of any jurisdiction that has a larger population than the ideal. And the number above that would seem to be what is in play and what is the criterion of merit for minimizing such splits.

Did you run that minimum analysis?

THE WITNESS: I don't think you can run that per se, Your Honor, but an experienced redistricting map maker, as part of the preliminary exploration of the state, which I do in any state that I address, would draw what they would refer to as a good government plan which would look at those very same factors. You could see what is possible.

Now, that may not fulfill all of the other goals that you're trying to accomplish, too, but the wider your deviation, the more — you know, if you go out to one percent from zero, it's a little easier to accommodate.

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[623]Q. And that's the so-called Cruz index falls in that category; right?

A. Well, Cruz is part of that equation. Cruz is a down-ballot election that had a lot of drop-off and there's a lot of voters that cast ballots that would vote for a position on the top of the ballot. Sometimes they call it ballot fatigue and as you move down ballot, people vote for less and less offices.

Q. Okay.

A. And I think Cruz is an excellent Democratic baseline vote.

[624]Q. Excellent Democratic baseline vote?

A. Democratic baseline vote, yes.

Q. Why not minority baseline vote?

A. Well, once again, in order to really ascertain the preferred choice of the Hispanic community or the Black community, it would be normal to look at primary elections and see how they support each other's candidates within the parties' primaries.

If you follow that analogy down to its logical conclusion, it means that in any district where a majority of the minorities vote for the Democratic candidate no

matter what that size is, that that is somehow or other a protected district.

Q. You find that somewhat problematic?

A. It certainly isn't true in my experience.

Q. All right. Now, one of Dr. Handley's criticisms of Dr. King's analysis was the failure to primary elections.

A. That was one of them.

Q. We're going to get to —

A. Okay.

Q. We're going to go through them and I want to take them one by one.

Did you join in that criticism

A. Yes.

Q. Why?

[625]A. Well, again, if I'm approaching a redistricting effort and in conjunction with my counsel and am advising people preparing for the election, one of the main things that I advise them, number one, is to get their database ready and get all of the prior elections for the decade and, most importantly, to collect all of the primary elections they can where minority candidates ran against minority

candidates or where minority candidates ran against each other because data is tremendously important in analyzing the voting polarization and making a determination of cohesion among voters. General election just doesn't tell the full story.

Q. All right. One of the criticisms of the Cruz index, then, is it was only one election, 2010; right?

A. Well, yes, it's a single point.

Q. Single point. Two, it was a general election; right?

A. Yes.

Q. And number three, it was an anomalous election which really was a very heavily Republican year in 2010; right?

A. Yes. And as I mentioned before, there were also down-ballot Democratic candidates that had very similar percentages of the state's votes in that election.

Q. Which tells us, then, that's a Democrat index but not a minority index?

A. Well, in my experience, from years of targeting elections and analyzing districts, I would say yes, it's a baseline vote.

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Appendix F

[Examination by David J. Cantelme]

[Witness: Linda McNulty taken on direct]

[776]Q. Mr. Adelson, you know who he was, of course?

A. Yes.

Q. And he was counsel to the Commission. True?

A. Yes.

Q. And he gave the Commission advice concerning the Voting Rights Act?

A. Yes.

Q. And compliance therewith, right?

A. Yes.

Q. And Mr. Adelson advised the Commission that it could depopulate the minority districts for purposes of compliance with Section 5. True?

A. He advised that it was an accepted way to strengthen [777]certain of the minority districts. Yes.

Q. So long as you stayed within 5 percent up or 5 percent down?

A. I don't think he gave us a hard and fast rule that way, but he said that we could not deviate by 10 percent, that we needed a valid reason for doing it, but that the Courts had ruled that it was an accepted way of strengthening minority districts.

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Appendix F

[Examination by Mary R. O'Grady]

[Witness: Linda McNulty taken on cross]

[780]Q. And according to plaintiffs Exhibit 69, the HVAP in districts -- in the districts that you identified were improved from draft to final, is that correct? We can go district by district. HVAP in District 4 improved by 2 percent, is that correct?

A. That's correct.

Q. HVAP in District 24 improved by 2.3 percent, is that correct?

A. Yes.

Q. And in District 26 by 1.6 percent, is that correct?

A. Yes.

* * *

[782]Q. And in 24 — or excuse me, in 26, in addition to adding some minority population, was there — there was some white non-Hispanic population?

A. Yes. In those central Phoenix neighborhoods, there was — I don't know that racially polarized voting is the correct term for that, but there was some white neighborhoods that were less strong in terms of minority voting strength, and we moved those [783]out.

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Q. Now, when you are referring to central Phoenix, are you referring then to District 24?

A. Yes. I mean the central valley, because 26 is really Tempe and West Mesa. But yes, that whole area.

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Appendix F

[Examination by David J. Cantelme]

[Witness: Linda McNulty taken on voir dire]

[796]Q. Commissioner McNulty, when I say the phrase "communities of interest" could you explain what that means to you in the context of your redistricting work?

A. Yes. My perspective with regard to community of interest, which I talked about during our work, was that a community of interest is a cohesive group of people who have a common cultural, ethnic, historical tie, and who come together to take part in the political process that whatever the district is you're drawing, that it is relevant to whatever it is that your district — that the district that you are drawing to advance those interests.

So for example, the Town of Guadalupe is a strong cohesive ethnic community, and they do participate in a Legislative district together. I saw SaddleBrooke as a neighborhood that came together and exercised their — participated in the political process together.

It was my own personal perspective that Marana, a big sprawling city, and Oro Valley and SaddleBrooke were not altogether one community of interest necessarily. But nevertheless, we heard a lot of testimony from folks who felt that they were.

MR. CANTELME: May I ask one question on voir dire, Your Honor?

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[797]CHIEF JUDGE SILVER: I'm not sure what it is.

MR. CANTELME: It's related to her definition of community of interest. Just one question.

CHIEF JUDGE SILVER: Well, I'm going to allow it, maybe in the nature of cross-examination. But we'll see. Go ahead.

VOIR DIRE EXAMINATION

BY MR. CANTELME:

Q. Community of interests include as an ethnic group non-Hispanic white?

A. If they have a common cultural or historical or, you know, other bond, I think they could. For example, it wouldn't make sense to me, if I understood your answer, I mean, your question correctly, it wouldn't make sense to me to divide SaddleBrooke into two Legislative districts. And I think they are non-Hispanic white voters by and large, because they come together to work on their problems, you know, seek solutions with their legislators as a group.

And I think I should be clear that community of interest is something that is not well defined. Folks have different perspectives on it. Folks on the Commission had different perspectives on it. But we heard — we did a great deal of thinking and paid a great deal of attention to that.

Appendix F

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[Examination by Mary R. O'Grady]

[Witness: Linda McNulty taken on cross]

[806]Q. And now, in some areas, District 12, 16, 25, the east valley of Maricopa County, is it fair to say you are not going to create a competitive district there because it's so predominantly Republican?

A. Yes. That's fair to say.

* * *

[822]JUDGE CLIFTON: I don't know you. I obviously know your firm by reputation.

The Commission received a lot of legal advice, and we have heard repeatedly the advice received with regard to voting rights districts and the ability to underpopulate those districts. And you just made reference to that.

Did you do any independent research or think independently about the merits of the questions you were being advised about, whether that was your independent conclusion or reach an independent conclusion like that?

THE WITNESS: You know, I did— I don't want to get too far astray from what my expertise here. I thought a lot about it. I think I did look at the *Larios* case that Mr. Adelson had explained to us. And, of course, I read many times the Department of Justice Guidance that we had to follow for preclearance.

Appendix F

I had — and the record shows, I had a lot of questions that I asked about why we needed 10 benchmarks and what the Hispanic election history had been in those benchmarks. But so at the end, I concluded that the advice that we were getting was cautious advice, but that it was consistent with what we — with our situation given how the [823]State of Arizona had been viewed by the Department of Justice, given the election history of Hispanics in the state, given that we had never gotten preclearance, given that Section 5 had been strengthened, and that we — I think the thing that I found most that justice would find most difficult about us is that we're the only Section 5 state in the country that starts from a clean slate. And so they can't look at the prior districts and see what we've done to them. They, you know, everything gets moved around.

And so it was going to be very hard for them to analyze where the populations were in these new districts and their perspective on us was that the last time we did this, we had intentionally discriminated.

So I knew they were going to be scrutinizing us very, very carefully, and I didn't — I felt like it was — I felt like the advice that we were being given was, as I said, very careful advice, very thoughtful advice, and that I should follow it.

And you know, I — this brings to mind that when we started and I first looked at the data from the last districts, it was clear there were eight benchmarks. And then very soon it became clear that there were nine. And I think Mr. Cantelme even testified that we needed to have at least nine benchmarks.

MR. CANTELME: Objection. Move to strike. That's not in the record.

***

[827]JUDGE WAKE: But did he ever address the possibility of simply telling the justice department that Arizona law requires minimum population deviation except for what's necessary to comply with the Voting Rights Act and it's not necessary to deviate in population, therefore, the Commission and the state are complying with the state law in achieving or pursuing as closely as possible equal population districts and therefore, that this is the best that can be done in terms of whatever plan would be submitted in terms of achieving none-retrogression? Did he ever tell you that that was an option?

THE WITNESS: No. We didn't talk about that.

***

[838]Q. Can you highlight that for me please, Jessica?

And so what we see is this change caused District 8 to go from 3,262 over to 4,873 under in total population. True?

A. Yes. That's correct.

***

Appendix F

[Examination by David J. Cantelme]

[Witness: Scott Freeman taken on direct]

[867]Q. Now, in your comments on — at the Commission hearing on January 17, 2012, appearing at page 47 of the transcript, you comment, beginning at line 14: "All the lines in southern Arizona remained virtually unchanged, with only minor changes to southern Arizona.

[868]"And in the rest of the state, whatever remained of my nine put, eventually over time got completely washed away.

"There is nothing of Commissioner Freeman in these maps."

Explain what you meant by that, "There is nothing of Commissioner Freeman in this maps."

A. I think where I was going was I think it was that there was another Commissioner saying, well, this was a product of compromise or deliberation or something like that trying to portray it as this was some sort of by partisan map or supposed to be an independently drawn map and I didn't view it that way at all. If there was any resemblance between a district and what became the final map and some district that I had drawn and some iteration of some map that I had drawn, it was happenstance or it was a trivial similarity. I didn't view it as that there had been a contribution by me in that map.

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Appendix F

[914]JUDGE WAKE: I have one question, Commissioner. Did the Commission ever draw a plan trying approach equal population to see how it would play out for non-retrogression?

[915]THE WITNESS: No.

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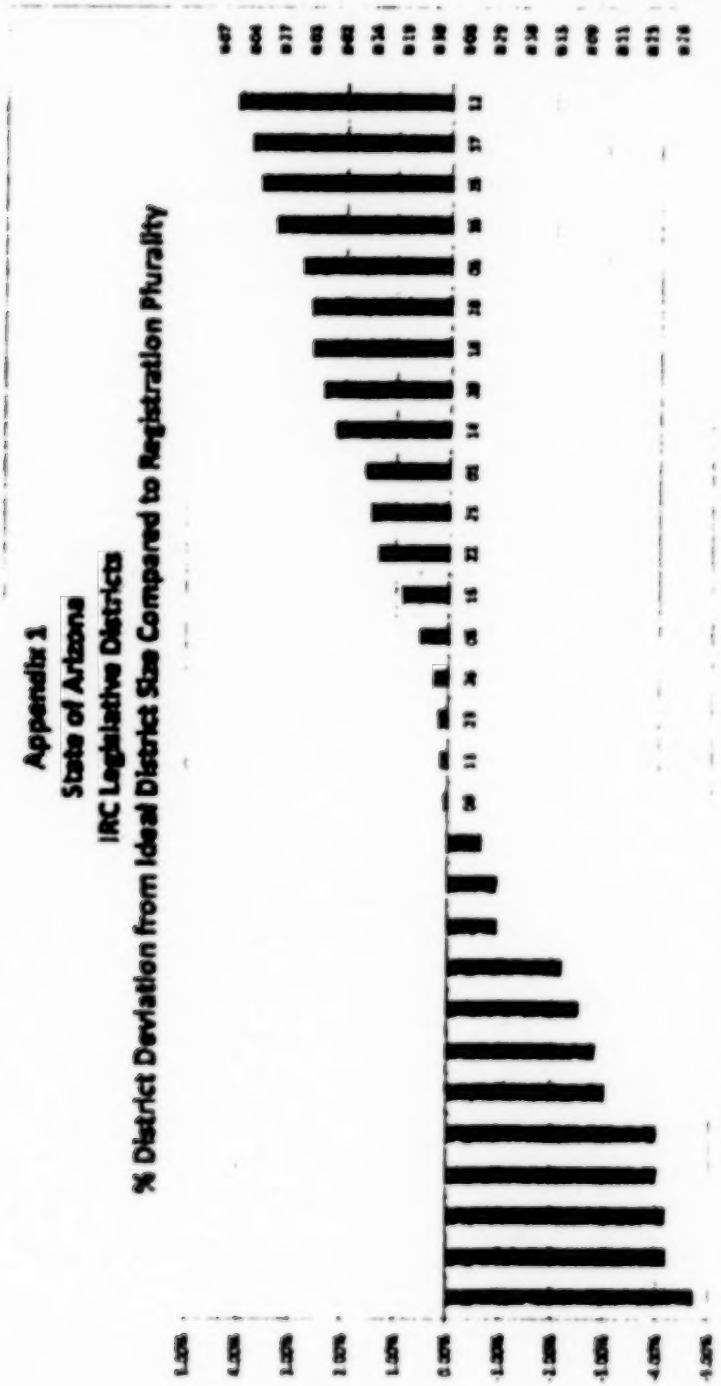
APPENDIX G — STATE OF ARIZONA, IRC LEGISLATIVE DISTRICTS, % DISTRICT DEVIATION FROM IDEAL DISTRICT SIZE COMPARED TO REGISTRATION PLURALITY



APPENDIX H — A.R.S. § 16-1103

§ 16-1103. Legislative and congressional redistricting; census enumeration

For purposes of adopting legislative and congressional district boundaries, the legislature or any entity that is charged with recommending or adopting legislative or congressional district boundaries shall make its recommendations or determinations using population data from the United States bureau of the census identical to those from the actual enumeration conducted by the bureau for the apportionment of the representatives of the United States house of representatives in the United States decennial census and shall not use census bureau population counts derived from any other means, including the use of statistical sampling, to add or subtract population by inference.

APPENDIX I — RELEVANT CONSTITUTIONAL AMENDMENT

U.S.C.S. Const. Amend. 14, § 1

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J — RELEVANT STATUTES

42 U.S.C.A. § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Appendix J

42 U.S.C.A. § 1973c. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose

nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

APPENDIX K — EXPERT REPORT OF THOMAS BROOKS HOFELLER PH.D.

Expert Report of Thomas Brooks Hofeller Ph.D.

Harris, et al. v. Arizona Independent Redistricting Commission, et al.
No. CV 12-0894-PHX-ROS-NVW-RCC

Expert Qualifications

I am a Partner in Geographic Strategies, LLC, located in Columbia, South Carolina. Geographic Strategies provides redistricting services including database construction, strategic political and legal support planning in preparation for actual line drawing, support services and training on the use of geographic information systems (GIS) used in redistricting, analysis of plan drafts, and actual line-drawing when requested. The corporation and its principals also provide litigation support.

I hold a Ph.D. from Claremont Graduate University, where my major fields of study were American political philosophy, urban studies and American politics. I hold a B.A. from Claremont McKenna College with a major in political science.

I have been involved in the redistricting process for over 46 years, and have played a major role in the development of computerized redistricting systems, having first supervised the construction of such a system for the California State Assembly in 1970-71. I have been active in the redistricting process leading up to and following

each decennial census since 1970. I have been intimately involved with the construction of databases combining demographic data received from the United States Census Bureau with election results which are used to determine the probable success of parties and minorities in proposed and newly enacted districts. Most of my experience has been related to congressional and legislative districts, but I have also had the opportunity to analyze municipal and county-level districts. I served for a year and a half as Staff Director for the U.S. House Subcommittee on the Census in 1998-99. I was Staff Director of the Subcommittee when the Census Bureau was proposing to substitute the American Community Survey (ACS) for the use of the decennial long form questionnaire in the 2000 and previous decennial Censuses. The long form was not used in the 2010 Decennial Census. I have drafted and analyzed plans in most states including, but not limited to, California, Nevada, Arizona, New Mexico, Colorado, Texas, Oklahoma, Kansas, Missouri, Minnesota, Wisconsin, Illinois, Indiana, Ohio, Arkansas, Mississippi, Louisiana, Alabama, Georgia, Florida, South Carolina, North Carolina, Virginia, New York, New Jersey and Massachusetts.

In this decennial round of redistricting, I have already been intensely involved in Texas, Alabama, North Carolina, Virginia and Massachusetts. As much of my consulting activity involves work in states subject to the provisions of Section 5 of the Voting Rights Act, I am very familiar with the data used to analyze the expected performance of redrawn and newly-created minority districts. I regularly advise clients about the

characteristics of minority districts in their plans, and whether or not they meet the requirements of both Sections 2 and 5 of the Voting Rights Act.

I have given testimony as an expert witness in a number of important redistricting cases including, but not limited to, *Gingles v, Edmisten*, 590 F. Supp. 345 (N.D.N.C. 1984), *aff'd in part and rev'd in part Thornburg v. Gingles* 478 U.S. 30 (1986); *State of Mississippi v, United States*, 490 F. Supp. 569 (D.C.D.C. 1979); *Shaw v. Hunt*, 92-202-CIV-5-BR, U.S. District Court for the Eastern District of North Carolina, Raleigh Division (1993-4); *Ketchum v. Byrne*,740 F.2d 1398, *cert. denied City Council of Chicago v. Ketchum*, 471 U.S. 1135 (1985), *on remand, Ketchum v. City of Chicago* 630 F. Supp. 551 (N.D. Ill. 1985); and *Arizonans for Fair Representation v. Symington*, CIV 92-0256, U.S. District Court Arizona (1992), *aff'd mem. sub nom. Arizona Community Forum v. Symington*, 506 U.S. 969 (1992).

I have done considerable work regarding compactness as a criterion in redistricting maps, including but not limited to a work I coauthored in *The Journal of Politics*, "Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering." *Id.*, Vol. 52, No. 4 (Nov., 1990), pp. 1155-1181 (with Richard G. Niemi, Bernard Grofman, and Carl Carlucci).

A copy of my curriculum vitae, which sets forth additional qualifications, my publications, and all cases in which I have testified as an expert witness at trial or by deposition, is attached hereto as *Exhibit A*.

Appendix K

Fee Disclosure

The work I am performing in support of this litigation is being paid by the Republican National Committee as part of a general contract to provide litigation support to various potential Republican litigants with Geographic Strategies LLC, billing the RNC at the rate of $16,000 per month.

Documents Reviewed

I reviewed the following documents in the preparation of this expert report,

1. Legislative Draft Map Competitiveness Report

2. Final Legislative Districts Compactness and Competitiveness Data Table

3. Districts with Registration Shifts Over 1% From Draft to Final Plans

4. My June 25, 2012 and September 7, 2012 Affidavits, including the documents attached thereto

5. The Final Congressional Map adopted on January 17, 2012, by the Arizona Independent Redistricting Commission ("IRC")

6. The Final Legislative Map adopted on January 17, 2012 by the IRC

7. The IRC's four reports accompanying each of the two maps as published on its website

8. The IRC's three data files accompanying each of the reports as published on its website

9. The 2010 Decennial Census data as it pertains to the State of Arizona

10. The 2010 5-year estimates from the U. S. Census Bureau's American Community Survey ("ACS")

11. IRC Splits Reports

12. Plaintiffs' Application for Preliminary Injunction and the exhibits attached thereto

13. The prior legislative plan, referred to herein as the Benchmark Plan, using the 2010 Decennial Census Redistricting Data File and the ACS

14. A CD containing a computerized district to census block assignment file that was delivered to opposing counsel with my June 25, 2012 Affidavit provided in this matter.

Factual Background

1. The 2010 Census report discloses that Arizona's 2010 population was 6,392.017.

2, Ariz. Const. art. 4, pt. 2, § 1(1) provides for 30 legislative districts. Thus, the ideal population for an Arizona legislative district is 213,067.

3. The technology of demographics has evolved to the point that demographers, assisted by computer GIS software, are capable of drawing legislative districts of precisely equal population, They are also capable of using this same technology to create intentional and arbitrary deviations from the ideal population in order to attain partisan and other political gains. The IRC 2011 Legislative Plan's range of district deviations from +4.07% to -4.71% is remarkably and unnecessarily wide, given Arizona's large ideal district population and the absence of any rational state criteria requiring such a wide range of deviation.

4. For purposes of this Report, I will refer to Republican districts, which contain more registered Republicans than Democrats (Republican registration plurality). Democrat districts contain more registered Democrats (Democrat registration plurality than Republicans. With one exception, every Republican district exceeds the ideal population of 213,067 residents, These include Districts 1, 5, 6, 11, 12, 14-18, 20-23, 25, and 28. The exception is District 13, which is only 0.64% below ideal population.

5. All of the 14 most overpopulated districts are Republican. All of the 12 under-populated districts, save one (District 13) are Democrat. The four remaining districts are all over-populated by less than 0.30%. Of

them, Districts 9 and 26 are Democrat and Districts 11 and 23 are Republican.

6. With just two exceptions, every Democrat district falls short of the ideal population of 213,067 persons. The over-populated Democrat districts are only slightly over-populated than the ideal -- District 9 by 0.07% and District 26 by 0.28%. The under-populated Democrat Districts are 2-4, 7, 8, 10, 13, 19, 24, 27, 29, and 30. Eighty-nine percent of the overpopulated districts are Republican and ninety-two percent of the under-populated districts are Democrat,

7. One Democrat district -- District 7 -- falls below population equality by 4.71 percent, the largest absolute deviation in the plan. District 7 is also the only Native American legislative district in the State. Four Democrat districts fall below by more than 3.5 percent: District 4 at 4.19 percent, District 27 at 4.16 percent, and Districts 3 and 2 at 3.97%. Four more fall below by more than 2 percent: District 24 at 3.01 percent, District 19 at 2.81 percent, District 30 at 2.49 percent, and District 8 at 2.18%.

8. On average the 11 under-populated Democrat districts fall short of the ideal by 3.03%. This high average population deviation indicates that an abnormal number of the Democratic districts are underpopulated and, indeed, underpopulated in excess of 3%. One would expect a more normal distribution of the deviations along the scale from minus 5% to plus 5%, unless these deviations were intentional.

9. Appendix 1 contains a bar chart showing the amplitude of deviation of each district with each district's bar colored according to party registration plurality. The bars colored green are the districts with Democrat pluralities, while the red bars are Republican.

10. I examined the Hispanic citizen voting age population ("HCVAP") and HVAP of the previous legislative map (the Benchmark Plan), as well as the election results from the 2002 through 2010 elections, to analyze the degree to which Hispanic candidates were elected in the seven districts with the highest HVAP.

11. Hispanic citizen voting age percentages were calculated using the U. S. Census Bureau's 2010 release of the American Community Survey (ACS). The lowest level of geography for which ACS data are compiled is the 2010 census block group. Using the ACS data in combination with the district block identification file generated from the Maptitude for Redistricting GIS system, it was possible to identify those block groups which have either 50% or 75%o of a district's population in them, The HCVAP data are then summarized for each district at both the 50% and 75% level. These tables are attached as Tables 1 and 2.

12. The legislative redistricting map pre-cleared by the Department of Justice in 2003 only contained one majority-minority citizen voting age population (CVAP) district. This district, Benchmark District 13, is one of only two districts in the Benchmark Plan which has consistently elected Hispanic candidates of choice in all three legislative seats within the district (There are

two House and one Senate seat – all elected at-large in each legislative district). As discussed below, the map produced a decade earlier obviously performed below expectations and well below proportionality for Hispanic voters in Arizona. According to the results of the 2010 ACS, Hispanics citizens of voting age comprise 17.89%o of Arizona's total citizen voting age population. Proportionality in terms of legislative districts for Arizona is, therefore, 5.37 districts which would be the equivalent of five state senators and 10 state house seats.

13. In the old IRC plan used in the 2010 election, four Hispanic senators were elected. All are Democrats. Seven Hispanic representatives, one of whom is a Republican, were elected to the House of Representatives. If Arizona had five HCVAP majority legislative districts one could expect the election of 5 Hispanic senators and 10 state house members.

14. The Benchmark Plan only contains two districts in which the Hispanic candidates have been consistently elected to both the one state senate and two state house seats in each of these districts. The first is Benchmark District 13, in Maricopa County (West Phoenix, Central Avondale and Tolleson, which has a HCVAP of 51.50% and a HVAP of 68.27%. The second is Benchmark District 27, Pima County (primarily the west side of Tucson), which has a HCVAP of 43.67% and a HVAP of 49.89. Benchmark Districts 14 and 16 also have HCVAP percentages in the mid-forty percent range. Benchmark District 14 has a HCVAP of 44.27% and a HVAP of 64.90%, while Benchmark District 16 has a HCVAP of 44.27% and a

HVAP of 56.74. Benchmark District 16 also has an African-American CVAP of over 18% - by far the highest in any legislative district. Benchmark District 14 elects primarily non-Hispanic white candidates while Benchmark District 16 elected either Hispanic or African-American candidates in the last 5 previous elections. The IRC's map fractured both county and city boundaries in order to craft their purported Hispanic districts.

15. Enacted-2011 District 13 is one of only two legislative districts in Arizona that have consistently elected the Hispanic community's candidates of choice to all three legislative seats throughout the decade. It is also the only legislative district which currently has a majority HCVAP. Remarkably, this district is the second most retrogressed district in the IRC's entire plan. Moreover, the IRC has so radically shifted District 13 and its surrounding area that it is now difficult to know exactly which district it should be compared to in the IRC's Plan. Just over 56% of the Hispanics in Benchmark District 13th are now located in new District 29 and just over 38% are now located in new District 19. The newly-Enacted 29th District draws just under 50% of its Hispanics from the Benchmark 13th District. This scrambling of benchmark districts, absent overriding state criteria, is highly uncommon in a Voting Rights Act state. Despite this issue, one point of comparison is inescapable: there is no legislative district in the Commission's 2011-Enacted plan that has a majority of Hispanic citizens of voting age.

16. The IRC's Final Legislative Map contained what the IRC purported to be seven "Hispanic opportunity districts." The seven are Districts 2, 3, 4, 19, 27, 29, and 30.

Appendix K

17. Table 1 below shows the Hispanic voting-age population ("HVAP") of the seven so called "opportunity" districts using the IRC's population breakdowns. The chart also shows the Hispanic HCVAP of these seven districts, as drawn from the 2010 American Community Survey, and compiled on Exhibit 7 to Plaintiffs' Application for Preliminary Injunction.

Table 1: Hispanic "Opportunity Districts"

Legislative District	Percentage HVAP	Percentage HCVAP
2	52.8%	41.29%
3	50.1%	43.59%
4	55.7%	45.38%
19	60.4%	46.26%
27	52.1%	39.82%
29	61.9%	43.88%
30	50.7%	33.01%

18. As shown in Table 2 below, of the seven purported Hispanic districts contained in the Final Legislative Map, five have HCVAP percentages that are retrogressed from the Benchmark Plan. All but one of these districts has a population significantly under the ideal district population of 213,067. The seven districts average a deviation of -2.2%. The seven districts' cumulative under-population is 32,588 persons from the ideal. Appendix 3 is a table which contains VAP and CVAP data for the IRC's so-called 2011 purported Hispanic Districts compared to the Hispanic districts in the Benchmark plan.

Appendix K

Table 2: HCVAP Retrogression

New Legislative District	Percentage HCVAP Retrogression from the Benchmark District
3	0.08 -
19	5.24 -
27	3.29 -
29	7.62 -
30	11.26 -

19. As shown on IRC's splits report, the Final Legislative Map split five of Arizona's 15 counties twice, and split another five counties more than twice. It left only five counties in a single district. The Final Legislative Map split the City of Glendale's population among five districts, the City of Peoria's population among three districts, the City of Mesa's population among 4 districts, the City of Tempe among three districts, the City of Surprise among three districts, the City of Scottsdale's population among two districts, and the City of Chandler's population among two districts. There was further fragmentation of these cities among more districts, but the populations in those splits were minor.

20. The firm hired as the IRC's mapping consultant, Strategic Telemetry, had no prior redistricting experience. Strategic Telemetry had other aptitudes, however, including political campaign advisory skills and voter behavior micro-targeting skills.

Appendix K

Expert Opinion

The IRC's Final Legislative Map

21. In my expert opinion, the only logical explanation for the systematic overpopulation of Republican-leaning districts and systematic under-population of Democrat-leaning districts is to maximize the number of Democrat-leaning districts, and to pack excess population into Republican-leaning districts.

22. This high average population deviation indicates that an abnormal number of these districts are overpopulated and, indeed, overpopulated in excess of 3%. One would expect a more normal distribution of the deviations along the scale from minus 5% to plus 5% unless these deviations were intentional. If the IRC had been drawing with equal population as a principal criterion, most of the districts would be expected to be within +/-1% of the ideal. Only nine of the IRC's 2011 districts are that close. If the IRC had used neutral redistricting criteria as its guiding principle in drawing the map, one might see some population deviations higher than 1%, but the pattern of district deviations would not correlate with partisanship to anywhere near the extent as seen in the IRC's plan. The only logical explanation is that the IRC's pattern of deviations was intended to have a partisan effect.

23. A complementary explanation for the wide range of deviations in the IRC's 2011 Legislative Plan becomes evident when one examines the correlation between the underpopulated districts and the minority percentages in

those districts. This correlation is even stronger than the partisan deviation correlation. A chart demonstrating this pattern is contained in Appendix 2. The five most under-populated districts in the IRC's 2012 map are also five of the districts which the Commission identified as so-called "minority opportunity districts." One of these districts is Native American and the other four are Hispanic. All seven of the districts which the IRC describes as so-called "Hispanic opportunity districts" are under-populated. The ten most under-populated districts in the IRC's 2012 map all have a total voting age minority populations in excess of 50% (less than 50% non-Hispanic adult whites). Only one additional legislative district has a voting age minority population in excess of 50%. That is District 26, which has a population only .28% over the ideal. There was no valid justification for this pattern of deviations as will be further discussed below.

24. One way to measure district deviations is in terms of the difference between the most and least populous district called top-to-bottom, overall range or total deviation. For the IRC's 2011 Legislative Plan total deviation would be calculated by taking the percentage deviation of most populous district (District 10 +4.07%) and adding to it the percentage deviation of the least populous district (District 7 -4.71%). Those two percentages are added together without the negative sign (absolute value) to yield an overall deviation range (or total deviation) of 8.79%. Another problem with the IRC's plan is that it only kept its district deviations within 2% for 12 districts and within 1% for 9 districts. In contrast, the California Citizens Redistricting Commission managed

to construct all 40 state senate districts all within a total deviation of 2% and with 12 of 40 districts with 1%. Other states such as Florida, Georgia, Iowa, Minnesota and Nevada were able to keep their state senate district plan total deviations below 2%. Indiana, Oregon and Virginia drew theirs below 4%.

25. Had the IRC properly followed the criteria for drawing districts mandated by ARIZ CONST. art. 4, pt. 2, § 1(14), it could not have made all but one Republican district over-populated and all but two Democrat districts under-populated. That such results occurred by chance defies all logic and probability.

26. Leaving aside the legal question of whether the Voting Rights Act can ever require a violation of the 14th Amendment's one person - one vote principle, it was totally unnecessary for the IRC to have created its high deviations or patterns of deviations, in order to draft its so-called Hispanic minority districts at the percentages of Hispanic voting age population (HVAP) found in the enacted map. The collective under-population of the IRC's seven Hispanic districts is 32,588 persons from what it would have been if all the districts were draw at the ideal population.

27. Yet there are a number of whole or split precincts on the boundaries of the IRC's seven so-called Hispanic districts persons which have very high percentages of Hispanic adults and contain about 87,500 persons. My analysis has shown that these seven districts could have been drafted at or above the ideal district population with

the same or higher level of Hispanic VAP. This is also true for the new 7th District, which the IRC drew with a Native American VAP of 63.1%. This district can be drawn with a population deviation of .02% with a Native American VAP of 61.0%, more than enough to qualify this as a Native American majority district. Thus, the only reasonable conclusion is that these highly Hispanic precincts have been deliberately separated from the IRC's purposed seven Hispanic districts to use their high percentages of Democratic votes to shore up the partisan composition of neighboring Democrat districts, or to directly or indirectly weaken Republican districts.

28. My study further indicates that the ratio of HCVAP (Hispanic citizen voting age population) compared to HVAP (both citizens and non-citizens Hispanic voting age population) is much higher in the Tucson area than the Phoenix area.

29. I conclude that the IRC could have drawn at least four majority Hispanic citizen voting age districts and at least one more majority minority citizen voting age district. The IRC decided instead to create 7 purported and weak, Hispanic districts, only two of which had HCVAP's above the HCVAP of Benchmark District 27. Even worse, 2011-Enacted District 29, the successor district to Benchmark District 13 had its HCVAP reduced from 51.50% to 43.88%.

30. The IRC had the opportunity to draw these seats extremely close to or over 50% HCVAP, which it did not. Three of these districts could have been in Maricopa

County, one in Pima County and one running along the State's southern border from Yuma to Nogales. What the IRC elected to do was to create 7 even weaker seats.

31. All these facts guide me to the conclusion that the IRC map drafters created all their Democrat legislative districts with negative population deviations, including the minority districts, in order to move substantial numbers of Hispanic voters into neighboring non-Hispanic white Democrat districts to shore up the Democrats' partisan advantage. What the Commission should have done was to place more population in the underpopulated districts so as to eliminate the dilution of voters in the overpopulated districts. It is clear from the numbers in this report that this could have been done without affecting the ability of Hispanics to elect candidates of their choice.

32. The IRC appeared to have engaged in intentional invidious dilution of Hispanic voting strength throughout the map. The IRC systematically spread Hispanic Democrats into predominantly non-Hispanic white Democrat districts in order to increase the strength of Democratic registration pluralities in them. Conformance with the Voting Right Act is factually clearly not a rationale for the IRC's violation of the equal population standard. Once again, the IRC weakened the ability of the Hispanic community to elect Hispanic candidates of their choice in order to elect more non-Hispanic white Democrats.

33. The lack of Hispanic members in the Arizona House of Representatives could also be tied to the interplay of the minority compositions of these districts and the use

of the multimember district election structure for the Arizona House of Representatives. The multimember districts used for House of Representatives elections combined with the Arizona "first past the post" election method can make it difficult for Hispanic candidates to win nomination or election to one, or sometimes both, of the House of Representatives seats when multiple Hispanic candidates run in the Democratic primary, or general, unless Hispanics constitute a majority of the HCVAP within the district. In the new plan approved by the IRC, no legislative district would have a majority of HCVAP.

34. The percentage HCVAP identified in Table 1 (Hispanic "Opportunity Districts") are inadequate HCVAP percentages to consistently allow the Hispanic community to elect candidates of their choice in Districts 2, 3, 4, 19, 27, 29, and 30.

35. An analysis of the percentages of retrogression in Final Legislative Map in terms of HCVAP (see Table 2) reveals that the IRC majority of Ms. Mathis, Mr. Herrera, and Ms. McNulty deliberately diluted the voting strength of Hispanic voters to protect Democratic districts.

36. The only possible explanation for these facts is that the individuals who were drawing the maps for the Arizona Commission were engaged in intentional political vote dilution. Their method for accomplishing this was to dilute the Hispanic voting strength as much as was politically possible so that they could use these Hispanic Democrats to shore up non-Hispanic white Democratic candidates. The Commission then increased

the Hispanic Democrat percentages for this purpose by under-populating the Hispanic districts. The Commission then artificially increased Democrat electoral strength even more by under-populating the non-Hispanic white Democrat districts so that fewer Democrat votes were necessary in order to control these districts. This fact was still further enhanced by removing Republican voters from these under-populated non-Hispanic white Democrat districts and placing them in highly Republican and massively overpopulated districts.

37. It would not have been necessary for the IRC's mapping consultant, Strategic Telemetry, to use partisan election results to understand exactly what was being done here. Strategic Telemetry is a Washington, D.C. based firm, serving primarily Democrat clients and which specializes in correlating election data with demographic data.

38. Factoring in the effect of under-population of both the Hispanic and adjacent Democrat districts, coupled with ethnic fragmentation, creates a deliberate and classic example of political vote dilution. It also represents a dilution of the votes of all registered voters in the overpopulated districts. This effect is further exacerbated by the low citizen voting age population percentages in some of the most underpopulated districts. My study also demonstrates that as the decade progresses this effect will intensify as all but one of the districts which presently have Democrat voter registration pluralities will become even more underpopulated relative to the 2020 ideal population, This is shown in Appendix 4 which is a chart

upon which the Democrat districts are represented by blue bars and the Republican districts by red bars.

39. These facts show that the IRC could have made up these districts' population shortfalls with minor adjustments in district lines, but chose not to do so to benefit Democrat incumbents or to increase the number of Democratic-leaning districts.

40. Respecting the neutral goals of city, town, and county boundaries, undivided census tracts, communities of interest, compactness, and contiguity, did not require the IRC's deviation from equality among legislative districts, as Plan X discussed below illustrates.

41. Respecting boundaries of counties, cities, towns, reservations, communities of interest, and undivided census tracts did not require the high deviations contained in the IRC's 2011 Legislative Plan. In my study, I was able to draft a plan with deviations under +/-.5%, the same number of split cities, town and reservations, and better compactness scores. Maps of this sample plan are attached as an appendix to my June 25, 2012 Affidavit provided in this case.

42. Neither compactness nor contiguity bears any relation to the IRC's deliberate overpopulation of Republican districts and under population of Democrat districts.

43. All my studies prove that the IRC has no valid reason for its violation of the one-person, one vote rule.

Appendix K

44. Despite its lack of prior redistricting experience, Strategic Telemetry's other political analysis abilities to correlated voter registration with voter behavior would allow it to carve out districts that might appear neutral but which, in fact, would maximize, to greatest extent possible, the Democrats 2011 redistricting goals.

45. In conclusion, it is my expert opinion that there is no logical or reasonable explanation for the deviations in the IRC's legislative redistricting scheme other that they were intentionally created with the invidious, discriminatory purpose of gerrymandering on the basis of partisanship and ethnicity. Additionally, I conclude that a plan with districts of equal or better Hispanic voting strength, but with less division of cities, towns and communities of interest, could have been drafted by the IRC with deviations under +/-.5% from the ideal.

Plan X: Minimal Population Deviations

46. The subject of my September 7, 2012 Affidavit in this matter was to create a legislative district plan for Arizona that (a) contains the number of what the IRC contend are Latino districts required by the mandates of sections 2 and 5 of the federal Voting Rights Act, and (b) includes minimal population deviations. I used the IRC's definitions of a Latino district in Plan X, even though it is my expert opinion that many of the "so called" Latino districts in Plan X, as well as in the IRC's Final Legislative Map, are not functional minority districts. I did this only to prove that they did not have to create these districts with excessively high negative deviations.

Appendix K

47. Using the IRC's Final Legislative Plan as a starting point I drafted a new legislative map I called Plan X. My goal was to: bring the deviations of the districts down as low as practicable, honor city and county boundaries, and maintain the same or greater percentages of adult Latino population as in the IRC redistricting scheme for Legislative Districts 2, 3, 4, 19, 27, 29 and 30.

48. Plan X clearly fulfills those requirements. The adult Latino populations are the same or greater, cities and county boundaries have been respected to the extent practicable, and the population deviations of the districts range from a high of +0.19% to a low of -0.19%. This gives Plan X a total deviation of 0.38%, which is more in line with the deviation percentages found in the map draw by the IRC in the last redistricting cycle. Chart 1, attached to my September 7, 2012 Affidavit, contains the demographic information for Plan X.

49. Since Plan X only took 2 days to draw, it is my expert opinion that the actual plan drafters employed by the IRC would have been fully aware that the high deviations contained for districts in the IRC's Final Legislative Plan were not necessary to fulfill the IRC's requirements under the VRA. It is also important to note that while the Commission's enacted plan split 70 census places, of which 17 were zero population splits, Plan X only splits 47 places, of which 3 were zero population splits.

50. It is also my expert opinion that plan drafters and the majority of members voting for the Final Legislative Map appear to have engaged in a cynical process of

deliberately under populating Democratic districts (including all seven of those districts which the IRC contends were their Latino districts) in violation of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), aff'd 542 U.S. 947 (2004), to advantage of future Democrat legislative candidates. I also contend that there is no basis, under the requirements of Arizona redistricting criteria, for such high deviations.

51. Chart 2, attached to my September 7, 2012 Affidavit, lists the 7 "so called" Latino districts in question along with the percentages of adult Hispanic population for these 7 districts in both Plans.

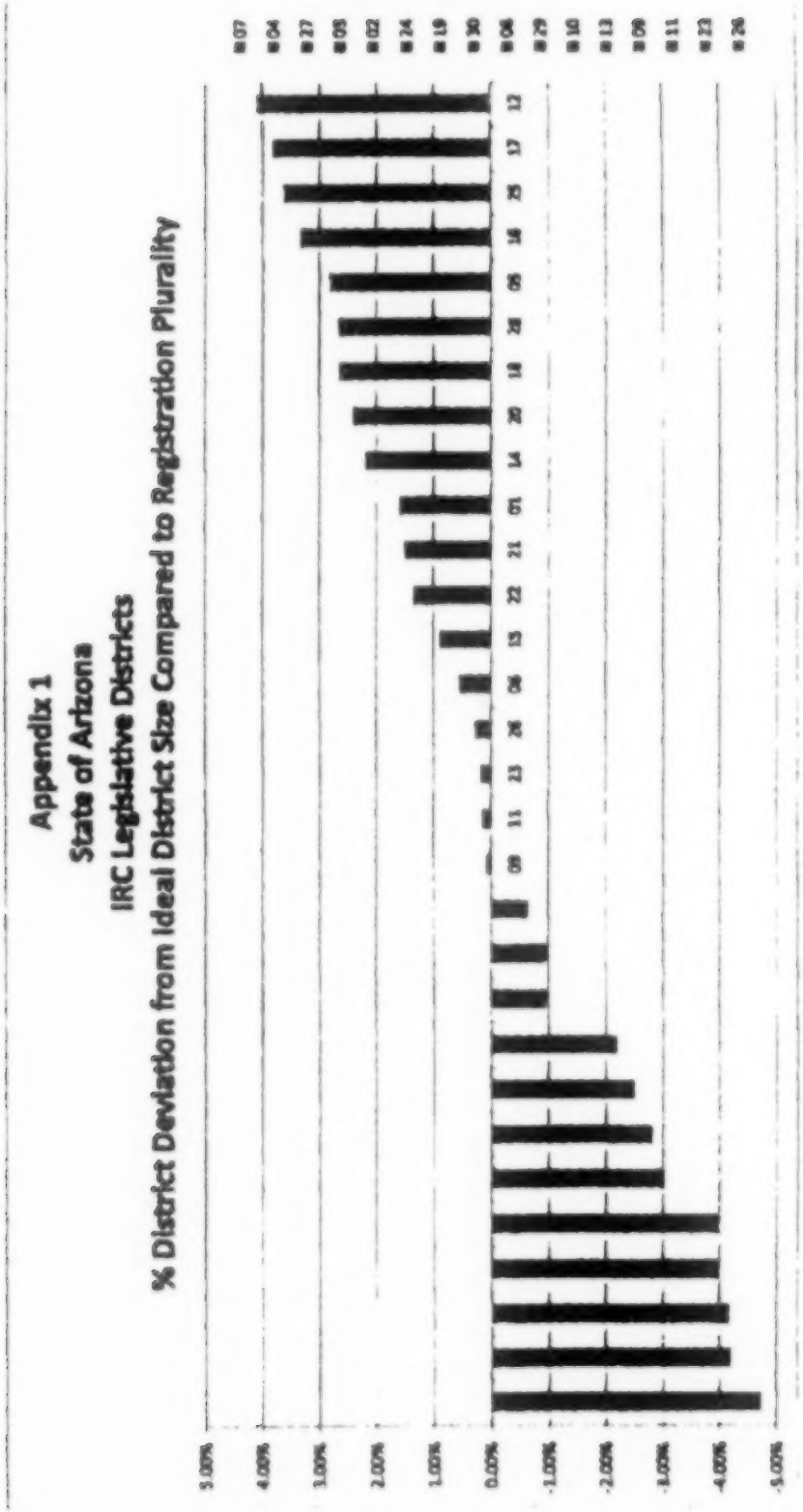
52. My opinions are unquestionably supported by Plan X, for which the maps and data are attached to this affidavit along with an electronic block file containing one record for each 2012 census block in Arizona and the district to which it is assigned in Plan X.

I declare under penalty of perjury that the foregoing is true and correct.

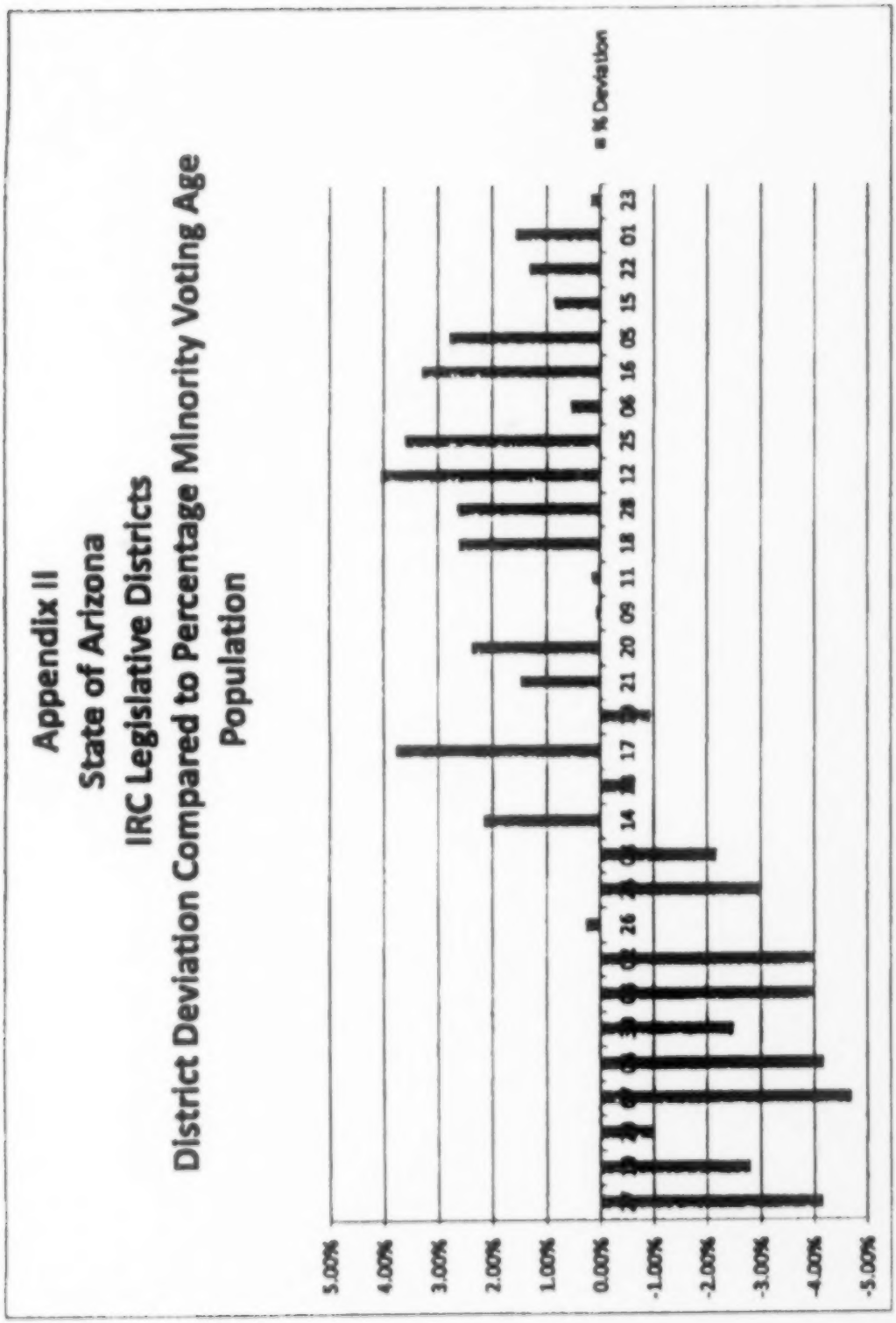
Dated: December 17, 2012

/s/_____
Thomas Brooks Hofeller, Ph.D.

Appendix K


Appendix 1
State of Arizona
IRC Legislative Districts
% District Deviation from Ideal District Size Compared to Registration Plurality

Appendix K


Appendix II
State of Arizona
IRC Legislative Districts
District Deviation Compared to Percentage Minority Voting Age Population
% Deviation
5.00%
4.00%
3.00%
2.00%
1.00%
0.00%
-1.00%
-2.00%
-3.00%
-4.00%
-5.00%

Appendix K

APPENDIX 3

STATE OF ARIZONA- LEGISLATIVE DISTRICTS

RETROGRESSION ANALYSIS FOR HISPANIC DISTRICTS

Comparing Benchmark to 2011 Enacted Districts

Using Citizen Voting Age Population*

Benchmark District	% Hispanic CVAP	Enacted District	% Hispanic CVAP	Percent Above or Below Bench
13**	51.50	19	46.26	-5.24
	51.50	29	43.88	-7.62
14	44.27	30	33.01	-11.26
16	43.11	27	39.82	-3.29
24	39.74	4	45.38	5.64
27	43.67	3	43.59	-0.08
29	38.66	2	41.29	2.63
13	51.50	29	43.88	-7.62

Source: U. S. Census Bureau - 2006-2010 American Community Survey

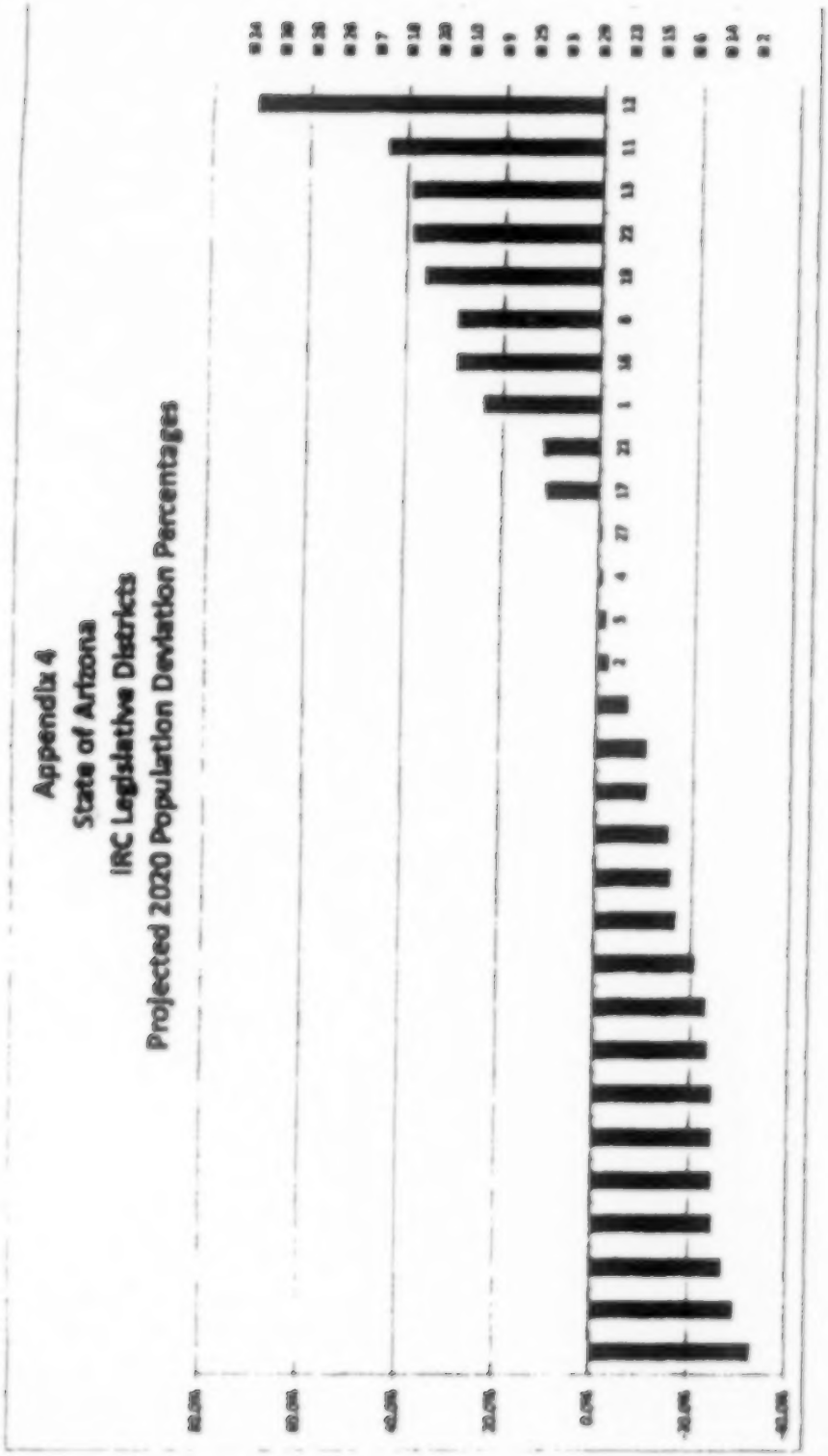
2010 Decennial Census Data - Redistricting Data Set

NOTE: Districts were matched using both a District Core Analysis and an Incumbency Pairing Report. There were 5 Democrat to Democrat, 13 Republican to Republican, and 10 Republican to Democrat pairings.

* Populations were based on all Census Blocks from the ACS that had more than 75% of its population contained within the legislative district.

** There is some ambiguity in designating the Benchmark 13th District as becoming the Enacted 19th or 29th District. Either way it is retrogressed.

Appendix K


Appendix 4
State of Arizona
IRC Legislative Districts
Projected 2020 Population Deviation Percentages

Appendix K

STATE OF ARIZONA

2012 AIRC ENATED LEGISLATIVE PLAN

Individual District Deviations Calculated Using Total Citizen Voting Age Population (TCVAP) as the Base - Sorted by Percent Deviation

District	HCVAP	% HCVAP	TCVAP	TCVAP Deviation	TCVAP % Deviation
[redacted]					
13	23,429	19.60%	119,536	-16,866	-12.37%
12	15,949	12.40%	128,621	-7,781	-5.70%
[redacted]					
11	19,747	14.70%	134,333	-2,069	-1.52%
21	20,698	15.30%	135,281	-1,121	-0.82%
[redacted]					
22	9,911	7.10%	139,592	3,190	2.34%
14	32,188	22.70%	141,797	5,395	3.96%

Appendix K

17	20,229	14.10%	143,468	7,066	5.18%
16	13,387	9.20%	145,511	9,109	6.68%
1	9,112	6.20%	146,968	10,566	7.75%
15	10,166	6.90%	147,333	10,931	8.01%
6	11,868	8.00%	148,350	11,948	8.76%
5	14,425	9.10%	158,516	22,114	16.21%
25	15,544	9.80%	158,612	22,210	16.28%
20	21,418	13.00%	164,754	28,352	20.79%
18	18,319	11.10%	165,036	28,634	20.99%
23	6,694	3.90%	171,641	35,239	25.83%
Total	732,962	17.91%	4,092,050	-10	-0.01%

Source: AIRC Submission to DOJ Requesting Preclearance ("Proposed Legislative Plan Demographic Data")

Note #1: Individual district TCVAP is calculated by dividing the district HCVAP by the district percentage HCVAP.

Note #2: Ideal district TCVAP population is computed by dividing the total statewide TCVAP by 30 yielding an ideal district TCVAP of 136,402.

Note #3: Red = AIRC Clined Hispanic - Purple = Elected both Dems and Reps - Blue = Other Dem Districts - Green = Native American District

Appendix K

STATE OF ARIZONA

2012 AIRC ENATED LEGISLATIVE PLAN

Individual District Deviations Calculated Using Total Citizen Voting Age Population (TCVAP) as the Base - Sorted by Percent Deviation

District	HCVAP	% HCVAP	TCVAP	TCVAP Deviation	TCVAP Deviatic
13	23,429	19.60%	119,536	-16,866	-12.37%
12	15,949	12.40%	128,621	-7,781	-5.70%
11	19,747	14.70%	134,333	-2,069	-1.52%
21	20,698	15.30%	135,281	-1,121	-0.82%
7	6,450	4.70%	137,234	832	0.61%
22	9,911	7.10%	139,592	3,190	2.34%
14	32,188	22.70%	141,797	5,395	3.96%

Appendix K

17	20,229	14.10%	143,468	7,066	5.18%
16	13,387	9.20%	145,511	9,109	6.68%
1	9,112	6.20%	146,968	10,566	7.75%
15	10,166	6.90%	147,333	10,931	8.01%
6	11,868	8.00%	148,350	11,948	8.76%
5	14,425	9.10%	158,516	22,114	16.21%
25	15,544	9.80%	158,612	22,210	16.28%
10	26,172	16.90%	164,694	28,292	20.68%
20	21,418	13.00%	164,754	28,352	20.79%
18	18,319	11.10%	165,036	28,634	20.99%
23	6,694	3.90%	171,641	35,239	25.83%
Total	732,962	17.91%	4,092,050	-10	-0.01%

Source: AIRC Submission to DOJ Requesting Preclearance ("Proposed Legislative Plan Demographic Data")

Note #1: Individual district TCVAP is calculated by dividing the district HCVAP by the district percentage HCVAP.

Note #2: Ideal district TCVAP population is computed by dividing the total statewide TCVAP by 30 yielding an ideal district TCVAP of 136,402.

Note #3: Red = AIRC Clined Hispanic - Purple = Elected both Dems and Reps - Blue = Other Dem Districts - Green = Native American District

APPENDIX L — ARIZONA INDEPENDENT REDISTRICTING COMMISSION 2012 CONGRESSIONAL DISTRICT POPULATION DATA TABLE

Final Legislative Districts - Approved 1/17/12 - Population Breakdown

Final Legislative Districts - Approved 1/17/12 - Population Breakdown

District	Population	Deviation from Ideal Population		Hispanic Population		Non-Hispanic (NH) White		NH African American		NH Native American		NH Asian		NH Hawaiian		NH Multi-Race and Other	
		#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
1	216,451	3,383	1.6%	24,035	11.1%	181,967	84.1%	1,913	0.9%	1,789	0.8%	2,812	1.3%	205	0.1%	3,730	1.7%
2	204,615	-8,452	-4.0%	121,900	59.6%	69,116	33.8%	5,909	2.9%	2,702	1.3%	2,302	1.1%	191	0.1%	2,495	1.2%
3	204,613	-8,454	-4.0%	115,569	56.5%	67,222	32.9%	6,053	3.0%	7,611	3.7%	4,750	2.3%	189	0.1%	3,219	1.6%
4	204,143	-8,924	-4.2%	123,594	60.5%	58,192	28.5%	5,891	2.9%	11,559	5.7%	2,083	1.0%	198	0.1%	2,626	1.3%
5	219,040	5,972	2.8%	34,316	15.7%	172,081	78.6%	1,822	0.8%	4,609	2.1%	2,106	1.0%	320	0.1%	3,786	1.7%
6	214,244	1,176	0.6%	33,176	15.5%	159,161	74.3%	2,004	0.9%	13,062	6.1%	2,406	1.1%	230	0.1%	4,205	2.0%
7	203,026	-10,041	-4.7%	13,878	6.8%	50,373	24.8%	914	0.5%	133,830	65.9%	757	0.4%	78	0.0%	3,196	1.6%
8	208,422	-4,645	-2.2%	72,456	34.8%	104,152	50.0%	9,211	4.4%	14,534	7.0%	3,042	1.5%	1,261	0.6%	3,766	1.8%
9	213,224	156	0.1%	46,661	21.9%	146,025	68.5%	5,917	2.8%	2,065	1.0%	7,573	3.6%	317	0.1%	4,666	2.2%
10	211,073	-1,994	-0.9%	49,128	23.3%	138,868	65.8%	9,556	4.5%	1,807	0.9%	6,076	2.9%	425	0.2%	5,213	2.5%
11	213,377	309	0.1%	48,249	22.6%	145,091	68.0%	7,160	3.4%	3,108	1.5%	5,124	2.4%	273	0.1%	4,372	2.0%
12	221,735	8,667	4.1%	34,578	15.6%	162,476	73.3%	6,797	3.1%	1,385	0.6%	10,823	4.9%	377	0.2%	5,299	2.4%
13	211,701	-1,366	-0.6%	66,106	31.2%	126,954	60.0%	7,530	3.6%	1,757	0.8%	4,990	2.4%	299	0.1%	4,065	1.9%
14	217,693	4,625	2.2%	67,082	30.8%	132,552	60.9%	7,070	3.2%	1,851	0.9%	3,654	1.7%	506	0.2%	4,978	2.3%
15	214,941	1,873	0.9%	22,035	10.3%	172,110	80.1%	4,086	1.9%	1,359	0.6%	10,720	5.0%	254	0.1%	4,377	2.0%
16	220,157	7,089	3.3%	36,222	16.5%	169,113	76.8%	4,816	2.2%	1,776	0.8%	3,734	1.7%	363	0.2%	4,133	1.9%
17	221,174	8,106	3.8%	47,472	21.5%	140,660	63.6%	9,238	4.2%	2,221	1.0%	16,160	7.3%	362	0.2%	5,061	2.3%
18	218,677	5,609	2.6%	31,641	14.5%	153,658	70.3%	10,190	4.7%	3,190	1.5%	13,997	6.4%	549	0.3%	5,452	2.5%
19	207,088	-5,979	-2.8%	134,862	65.1%	45,004	21.7%	16,061	7.8%	2,350	1.1%	4,855	2.3%	365	0.2%	3,591	1.7%
20	218,167	5,099	2.4%	46,856	21.5%	148,114	67.9%	8,325	3.8%	2,947	1.4%	6,714	3.1%	373	0.2%	4,838	2.2%
21	216,242	3,174	1.5%	53,053	24.5%	143,644	66.4%	8,819	4.1%	1,562	0.7%	4,485	2.1%	307	0.1%	4,372	2.0%
22	215,912	2,844	1.3%	22,375	10.4%	175,513	81.3%	5,822	2.7%	839	0.4%	7,117	3.3%	276	0.1%	3,970	1.8%
23	213,451	383	0.2%	12,212	5.7%	186,190	87.2%	2,833	1.3%	1,616	0.8%	6,889	3.2%	168	0.1%	3,543	1.7%
24	206,659	-6,408	-3.0%	85,381	41.3%	92,695	44.9%	13,046	6.3%	6,716	3.2%	4,291	2.1%	330	0.2%	4,200	2.0%
25	220,795	7,727	3.6%	43,023	19.5%	160,255	72.6%	5,837	2.6%	3,655	1.7%	3,397	1.5%	536	0.2%	4,092	1.9%
26	213,659	-591	-0.3%	82,251	38.5%	96,917	45.4%	11,034	5.2%	10,155	4.8%	7,254	3.4%	1,031	0.5%	5,017	2.3%
27	204,195	-8,872	-4.2%	116,568	57.1%	40,058	19.6%	29,982	14.7%	7,628	3.7%	5,757	2.8%	436	0.2%	3,766	1.8%
28	218,713	5,645	2.6%	48,111	22.0%	152,121	69.6%	5,919	2.7%	2,958	1.4%	5,492	2.5%	244	0.1%	3,868	1.8%
29	211,067	-2,000	-0.9%	142,923	67.7%	45,815	21.7%	12,402	5.9%	2,119	1.0%	4,250	2.0%	184	0.1%	3,374	1.6%
30	207,763	-5,304	-2.5%	119,436	57.5%	59,550	28.7%	12,944	6.2%	4,666	2.2%	6,899	3.3%	312	0.2%	3,956	1.9%

Appendix L

Final Legislative Districts - Approved 1/17/12 -
Voting Age Population Breakdown

Final Legislative Districts - Approved 1/17/12 - Voting Age Population Breakdown

District	Voting Age Pop.	Hispanic Voting Age Pop.		Non Hispanic (NH) White Voting Age		NH African American		NH Native American Voting		NH Asian Voting Age Pop.		NH Hawaiian Voting Age		NH Multi-Race and	
		#	%	#	%	#	%	#	%	#	%	#	%	#	%
1	170,136	15,190	8.9%	147,538	86.7%	1,457	0.9%	1,386	0.8%	2,189	1.3%	174	0.1%	2,202	1.3%
2	148,925	78,653	52.8%	60,416	40.6%	4,539	3.0%	1,933	1.3%	1,881	1.3%	152	0.1%	1,351	0.9%
3	154,745	77,451	50.1%	60,946	39.4%	4,632	3.0%	5,111	3.3%	4,225	2.7%	139	0.1%	2,241	1.4%
4	141,485	78,816	55.7%	47,013	33.2%	4,529	3.2%	7,926	5.6%	1,599	1.1%	158	0.1%	1,444	1.0%
5	174,701	22,009	12.6%	143,620	82.2%	1,424	0.8%	3,291	1.9%	1,773	1.0%	246	0.1%	2,338	1.3%
6	169,965	21,327	12.5%	132,925	78.2%	1,639	1.0%	9,210	5.4%	2,092	1.2%	186	0.1%	2,586	1.5%
7	139,259	8,545	6.1%	40,013	28.7%	778	0.6%	87,851	63.1%	590	0.4%	61	0.0%	1,421	1.0%
8	153,405	48,030	31.3%	81,918	53.4%	7,014	4.6%	10,829	7.1%	2,524	1.6%	1,141	0.7%	1,949	1.3%
9	172,120	31,504	18.3%	125,635	73.0%	4,346	2.5%	1,550	0.9%	6,038	3.5%	222	0.1%	2,825	1.6%
10	166,639	32,487	19.5%	117,413	70.5%	7,195	4.3%	1,339	0.8%	4,970	3.0%	326	0.2%	2,909	1.7%
11	160,257	29,474	18.4%	117,449	73.3%	4,935	3.1%	2,131	1.3%	3,890	2.4%	185	0.1%	2,193	1.4%
12	147,754	20,504	13.9%	111,743	75.6%	4,497	3.0%	930	0.6%	7,639	5.2%	258	0.2%	2,183	1.5%
13	156,650	40,759	26.0%	103,306	65.9%	5,333	3.4%	1,363	0.9%	3,675	2.3%	218	0.1%	1,996	1.3%
14	163,012	43,999	27.0%	105,951	65.0%	5,448	3.3%	1,479	0.9%	3,034	1.9%	388	0.2%	2,713	1.7%
15	162,579	13,970	8.6%	133,974	82.4%	3,037	1.9%	973	0.6%	8,176	5.0%	193	0.1%	2,256	1.4%
16	164,719	21,337	13.0%	133,781	81.2%	3,353	2.0%	1,260	0.8%	2,806	1.7%	245	0.1%	1,937	1.2%
17	161,935	29,525	18.2%	110,213	68.1%	6,526	4.0%	1,515	0.9%	11,568	7.1%	269	0.2%	2,319	1.4%
18	168,966	21,459	12.7%	124,070	73.4%	7,413	4.4%	2,280	1.3%	10,644	6.3%	384	0.2%	2,716	1.6%
19	133,549	80,622	60.4%	35,275	26.4%	10,325	7.7%	1,639	1.2%	3,645	2.7%	278	0.2%	1,765	1.3%
20	166,570	29,476	17.7%	120,748	72.5%	6,029	3.6%	2,102	1.3%	5,315	3.2%	268	0.2%	2,632	1.6%
21	164,688	32,423	19.7%	119,158	72.4%	6,140	3.7%	1,098	0.7%	3,531	2.1%	204	0.1%	2,134	1.3%
22	167,688	13,708	8.2%	141,890	84.6%	4,149	2.5%	586	0.3%	5,277	3.1%	206	0.1%	1,872	1.1%
23	176,271	8,631	4.9%	156,821	89.0%	2,284	1.3%	1,189	0.7%	5,263	3.0%	121	0.1%	1,962	1.1%
24	157,984	53,875	34.1%	82,855	52.4%	9,883	6.3%	4,861	3.1%	3,635	2.3%	237	0.2%	2,638	1.7%
25	167,944	26,254	15.6%	129,933	77.4%	4,217	2.5%	2,399	1.4%	2,711	1.6%	378	0.2%	2,052	1.2%
26	164,423	52,537	32.0%	85,964	52.3%	8,347	5.1%	6,994	4.3%	6,575	4.0%	705	0.4%	3,301	2.0%
27	140,329	73,051	52.1%	34,090	24.3%	21,210	15.1%	5,177	3.7%	4,502	3.2%	312	0.2%	1,987	1.4%
28	169,608	30,085	17.7%	126,340	74.5%	4,391	2.6%	2,136	1.3%	4,405	2.6%	174	0.1%	2,077	1.2%
29	135,426	83,827	61.9%	36,737	27.1%	8,345	6.2%	1,459	1.1%	3,193	2.4%	135	0.1%	1,730	1.3%
30	141,271	71,675	50.7%	50,160	35.5%	8,834	6.3%	3,210	2.3%	4,952	3.5%	237	0.2%	2,203	1.6%

MOTION

No. 14-232

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Arizona

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED
(Restated)

The Arizona Independent Redistricting Commission approved a state legislative districting plan that included minor population deviations between districts. The Supreme Court has held that States may apportion with population deviations that are based on "legitimate considerations incident to the effectuation of a rational state policy," *Reynolds v. Sims*, 377 U.S. 533, 579 (1964), and that the existence of "minor deviations" like those in Arizona's plan "are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State," *Gaffney v. Cummings*, 412 U.S. 735, 745-48 (1973). The district court assumed without deciding that the desire for partisan gain would not be a legitimate consideration.

1. Should the Court summarily affirm the district court's conclusion that Appellants failed to overcome the presumption that Arizona's legislative redistricting plan is constitutional when the facts showed that the plan's minor deviations predominately resulted from the Commission's good-faith desire to comply with the Voting Rights Act, not partisan gain?

2. Should the Court summarily affirm the district court's decision that the Commission's desire to comply with § 5 of the Voting Rights Act was a

QUESTIONS PRESENTED (Restated)
– Continued

rational state policy notwithstanding that this Court decided more than a year after the Commission acted that the coverage formula subjecting Arizona to the requirements in § 5 is unconstitutional, *see Shelby County v. Holder*, 133 S. Ct. 2612 (2013)?

3. Should the Court summarily affirm the district court's decision or dismiss the appeal as to Appellant's question presented asserting that the Commission "disregard[ed] the majority-minority rule" when compliance with § 2 of the Voting Rights Act is not an issue in the case and the district court concluded that the minor population deviations in the districts were the result of a good faith effort to comply with § 5 of the Voting Rights Act?

PARTIES TO THE PROCEEDING

The Appellants/Plaintiffs are listed in the jurisdictional statement.

The Appellees/Defendants are listed correctly except for the inclusion of the commissioners of the Arizona Independent Redistricting Commission. The district court granted the individual commissioners' motion for judgment on the pleadings, dismissing them as defendants. J.S. App. 44a-47a. Appellants do not challenge that portion of the district court's order.

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JURISDICTION

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

In addition to those set forth in Appellant's jurisdictional statement, the Commission refers to the following constitutional provision.

Article IV, Part 2, § 1 of the Arizona Constitution states, in relevant part:

> (3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to

upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office . . . and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

. . .

(6) Appointments to the independent redistricting commission shall be made in the order set forth below. No later than January 31 of years ending in one, the highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate. . . .

.

(8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be registered with any party already represented on the independent redistricting commission and who shall serve as chair. . . .

. . .

(12) Three commissioners, including the chair or vice-chair, constitute a quorum. Three or more affirmative votes are required for any official action. Where a quorum is present, the independent redistricting commission shall conduct business in meetings open to the public, with 48 or more hours public notice provided.

. . .

(14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below.

A. Districts shall comply with the United States Constitution and the United States voting rights act;

B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;

C. Districts shall be geographically compact and contiguous to the extent practicable;

D. District boundaries shall respect communities of interest to the extent practicable;

> E. To the extent practicable, district lines shall use visible geographic features, city, town, and county boundaries, and undivided census tracks;
>
> F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.
>
> . . .
>
> (16) The independent redistricting commission shall advertise . . . a draft map of legislative districts to the public for comment, which comment shall be taken for at least thirty days. . . . The independent redistricting commission shall then establish final district boundaries.

MOTION TO DISMISS OR AFFIRM

Despite Appellants' efforts to reframe the fact-bound per curiam order into a new case posing broad legal questions, the appeal does not present any substantial federal issues meriting this Court's attention. Appellee Arizona Independent Redistricting Commission therefore respectfully requests that the Court summarily affirm the decision below.

Appellants raise far-reaching issues that have little to do with the actual findings and ruling on appeal. They brought this suit on the theory (and told the court they would prove at trial) that "a policy of increasing the Democratic Party's strength" caused

the minor population deviations – an average overall deviation of 2.2 percent and a maximum deviation of 8.8 percent – in Arizona's legislative redistricting plan. Doc. 176 at 2. After a five-day trial and review of transcripts of the Commission's many public meetings, the district court found that was not true and that "compliance with federal voting rights law was the predominant reason for the deviations." J.S. App. 6a. The court did not need to decide whether political motivations are illegitimate redistricting considerations because even assuming they are, Appellants could not prove their claim. At most, "some of the commissioners were motivated in part in some of the linedrawing decisions by a desire to improve Democratic prospects." *Id.* The limited extent of that partisan motive does not indicate any constitutional infirmity. If it did, Appellants' argument could result in overturning virtually every state's legislative redistricting plan, an untenable and constitutionally unacceptable affront to State sovereignty.

The district court held that the Commission's desire to comply with the Voting Rights Act, including the obligation to obtain preclearance, is a rational state policy capable of justifying minor deviations in population. J.S. App. 65a-72a. The Court should summarily affirm on the same narrow grounds. Appellants' argument would require the Court to hold that compliance with federal law, although mandatory, was irrational. It would also clash with this Court's decisions holding that non-mandatory policy decisions to respect county lines or protect incumbent politicians can justify deviations that go far beyond

the minor ones at issue here. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 847-48 (1983) (holding that state policy of adhering to county boundaries justified underpopulating district by 60 percent); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (listing "avoiding contests between incumbent[s]" among policies that "might justify some variance" in congressional districts). The fact that this Court's subsequent decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), removes Arizona's obligation to seek preclearance does not render the Commission's efforts to obtain preclearance irrational or illegitimate.

This is not the case for the Court to decide whether partisan motivations can invalidate a map with minor population deviations. The district court rejected Appellants' partisanship arguments based on the evidence. This Court should summarily affirm.

STATEMENT OF THE CASE

The Jurisdictional Statement disregards much of the record below, which includes four days of testimony and transcripts of the hundreds of hours of public meetings during which the Commission did its work. The pertinent facts set forth here are based on the record below, including the findings in the district

court, which the Jurisdictional Statement nowhere challenges as clearly erroneous.[1]

I. The Arizona Constitution required the Commission to draw legislative districts based on enumerated criteria, including compliance with the Voting Rights Act.

Since 2000, the five-member Commission has created Arizona's state legislative districts after each decennial census. *See generally* Ariz. Const. art. IV, pt. 2, § 1(3). The Commission begins anew each decade with partisan appointments made by the Legislature's majority and minority leadership who choose four of the five commissioners. *Id.* § 1(3)-(5). The four party-affiliated commissioners then select the fifth commissioner who serves as chairperson. *Id.* § 1(8).

To create legislative districts, the Commission must start from a blank slate by forming a map in a "grid-like pattern across the state." *Id.* § 1(14). From there, the Arizona Constitution requires the Commission to make a draft map by adjusting the "grid-like" map to accomplish various enumerated legislative "goals." *Id.* § 1(14). The first goal is mandatory:

---

[1] The Court reviews a district court's factual findings regarding a legislative body's motivation for clear error. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). The lower court's findings stand unless the Court is "left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (internal quotation marks omitted)).

"Districts shall comply with the United States Constitution and the United States voting rights act." *Id.* § 1(14)(A). The constitution directs the Commission to accommodate the remaining enumerated goals "to the extent practicable," including: equal population between districts; "geographically compact and contiguous" districts; boundaries that "respect communities of interest"; lines that "use visible geographic features, city, town and county boundaries, and undivided census tracts"; and "competitive districts should be favored where to do so would create no significant detriment to the other goals." *Id.* § 1(14)(B)-(F). Once done, the Commission must advertise the "draft map of legislative districts to the public for comment . . . for at least thirty days." *Id.* § 1(16). After the public comment period and any final revisions, the Commission approves the final map. *Id.* The Commission cannot consider the residence locations of incumbents or candidates when it redraws the maps. *Id.* § 1(15).

The Commission must complete its work "in meetings open to the public," *Id.* § 1(12), which it did during dozens of public meetings during 2011 and early 2012. Transcripts of the hundreds of hours of meetings are in the record below.

II. The Commission considered compliance with the Voting Rights Act and obtaining preclearance on the first try an important priority.

At the time of the Commission's work, Arizona was subject to § 5 of the Voting Rights Act, meaning

that to implement the districting plan Arizona was required to obtain preclearance from the Department of Justice (the "Department") or (via a declaratory judgment) from a three-judge panel in the District of Columbia. J.S. App. 19a-20a; *see* 52 U.S.C. § 10304(a).[2] To receive preclearance, a State must prove that a redistricting plan has neither the purpose nor effect of "diminishing the ability of any citizens . . . on account of race or color, [or membership in a language minority group], to elect their preferred candidates of choice." *See* 52 U.S.C. § 10304(b).

In general, § 5 prohibits covered States from enacting a plan if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (internal quotation marks and citation omitted). At a minimum, a State's new plan, when compared to the previous (or "benchmark") plan, may not reduce the number of districts in which a minority group has the ability to elect a candidate of choice. *See Texas v. United States*, 887 F. Supp. 2d 133, 157 (D.D.C. 2012) (citing *Abrams v. Johnson*, 521 U.S. 74, 97-98 (1997)), *vacated and remanded*, 133 S. Ct. 2885 (2013) (remanding in light of *Shelby County*).

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[2] After the Commission's districting plan received preclearance and was used in the 2012 election, this Court invalidated the coverage formula used to designate which states are subject to § 5 preclearance. *See Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

Arizona's legislative districting plans had never been precleared on the first attempt. The consequences of a failure to preclear are significant. Because of the time pressures of election cycles, a federal court must often step in to impose a districting plan on a State. That is what happened to Arizona's Commission-drawn map in the 2000 cycle. *See Navajo Nation v. Ariz. Ind. Redistricting Comm'n*, 230 F. Supp. 2d 998 (D. Ariz. 2002). In addition, a failure to obtain preclearance makes a jurisdiction ineligible to "bail out" of § 5 obligations for another decade. *See* 52 U.S.C. § 10303(a)(1)(E).

Given these consequences and Arizona's troubled history with preclearance, the record shows that the commissioners considered compliance with the Voting Rights Act and preclearance an important priority. *See, e.g.*, J.S. App. 23a-24a; Supplemental Appendix to Motion to Dismiss ("Supp. App.") 2, 5, 12-13, 17.

A. The Commission reasonably attempted to create at least ten ability-to-elect districts to show a lack of retrogression and obtain preclearance.

As the district court observed, designing districts and proving that they avoid retrogression is not a simple task. J.S. App. 20a-24a. Many factors "encourage states to do more than the bare minimum to avoid retrogression." *Id.* at 22a. Retrogression is not decided based on a single statistic or easily ascertainable metric. *See* 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011)

(describing Department's use of "functional analysis" that does not turn on "any predetermined or fixed demographic percentages"). In addition, the Department does not provide any explanation when it approves a plan, meaning that a State could not know how many benchmark districts or ability-to-elect districts the Department believed existed. J.S. App. 22a-23a; Supp. App. 11-12, 15.

The Jurisdictional Statement is therefore wrong when it implies (at 6-7) that the Commission knew there were only eight benchmark districts. *See* J.S. App. 27a-28a. When it was drawing the draft map, the Commission's legal team advised that the Commission should assume that the benchmark plan contained ten ability-to-elect districts. J.S. App. 205a; Supp. App. 5, 20-21.

In October 2011, on a 4-1 vote, the Commission approved of a draft map that attempted to create ten ability-to-elect districts. J.S. App. 28a.

B. The Commission understood that minor population deviations were a permissible byproduct of good faith efforts to avoid voting-rights retrogression, and the facts show that such deviations are a common feature of many redistricting plans.

Before the Commission made adjustments to the draft map, it received racial polarization voting analysis. J.S. App. 29a-30a. The analysis prompted the Commission's counsel to advise the Commission

to improve the case for preclearance by strengthening minority voting ability in three of the proposed ability-to-elect districts (Districts 4, 24, and 26). Supp. App. 13, 35.

The Commission's counsel and consultants also advised that slight deviations in population were permissible effects of efforts to enhance a minority group's ability to elect in a given district. *Id.* at 12, 21-22, 36-37. The Commission's counsel explained that minor population deviations were constitutional if they existed as a result of legitimate, rational objectives; the record shows that the Commission's actions were not based on an absolute "safe harbor" range of population deviations. *Id.* at 28-31, 35-37.

In addition, the Commission understood that modest underpopulation of ability-to-elect districts was commonly done in other jurisdictions. *Id.* at 15-18, 29. In fact, in the plan the federal court approved for Arizona in 2002, several of the ability-to-elect districts were underpopulated. *Navajo Nation*, 230 F. Supp. 2d at 1008-09 (showing districts 13-16, all voting rights districts, with populations below the "ideal" population, and affirming constitutionality of plan with "total deviation of 9.03%").

To underpopulate an ability-to-elect district and thereby strengthen a minority's ability to elect candidates of its choice, the consequence often would be to remove population from districts that had a higher

proportion of voters who were registered Democrats. As a commissioner explained, the Commission's data showed that "70, 74 percent of Hispanics are registered Democrats." Supp. App. 5-7

III. The final legislative map contained minor deviations that resulted from efforts to satisfy many redistricting policies, including the Commission's desire to comply with the Voting Rights Act.

The 30 legislative districts in the final map have varying minor population deviations. J.S. App. 9a-10a. Of the 30 districts, 12 are underpopulated to varying degrees and 18 are overpopulated. At the outer boundaries, District 7, the sole majority Native American district, was 4.7 percent below the ideal population and District 12 was 4.1 percent over, for a total maximum deviation of 8.8 percent. *Id.* at 12a. The average variation from strict equality is only 2.2 percent. *Id.* at 9a-10a; Supp. App. 15.

A. The minor population deviations in the final map resulted from the Commission's consideration of legitimate state policies.

Appellants' primary claim is that the Commission's plan was designed to "gain an advantage for the Democrats by overweighting the votes of Democrat voters." J.S. at 7. Their central proof is the

statistics of the map: the districts that are underpopulated by more than 2 percent had a Democrat plurality of registered voters and the districts overpopulated by more than 2 percent had a Republican plurality. J.S. at 8-9. To Appellants, this is all the proof they need; the correlation of under-and-overpopulation with party-registration plurality "tell[s] the story." J.S. at 9.

That the plan was designed to "gain an advantage" may be Appellants' premise, but it is not what the district court found and not what the record shows. The district court's opinion focuses only on the population changes made to three districts (Districts 8, 24, and 26) because those were the changes the plaintiffs emphasized at trial. J.S. App. 7a. The record also shows that the Commission balanced many competing policies, including using county boundaries, enhancing compactness, respecting communities of interest, increasing competitiveness, and obtaining preclearance and compliance with § 5 of the Voting Rights Act. *See* Ariz. Const. art. IV, pt. 2, § 1(14)(A)-(F); Supp. App. 2-5, 7-10, 32-33, 41-42.[3]

With respect to the Voting Rights Act, several population shifts occurred because of the advice given

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[3] Appellants incorrectly describe the Commission's position, including that preclearance is the sole justification for the map's minor deviations. *See* J.S. at 27, 31. That is not the Commission's position. *See, e.g.*, Doc. 219 at 10-21. The district court focused on only a narrow set of changes made to Districts 8, 24, and 26 because that was Appellants' focus at trial. J.S. App. 7a. This Court need not go further to summarily affirm.

to the Commission that Districts 4, 24, and 26 should be strengthened to bolster the case for preclearance. *See, e.g.*, *id.* at 13. Appellants focus their challenge on Districts 24 and 26, arguing that their expert witness "opined that neither District 24 nor 26 . could be Hispanic ability-to-elect districts." J.S. at 7. From this premise, Appellants suggest that any population deviations resulting from changes to these districts must have been a pretext.

The district court concluded differently, finding that "[c]reation of these districts was primarily a consequence of the Commission's good-faith efforts to comply with the Voting Rights Act and to obtain preclearance." J.S. App. 78a. The record supports the court's findings. *E.g.*, Supp. App. 13, 35. The resulting shifts in population were small: District 24 decreased from barely overpopulated (+0.2 percent) to modestly underpopulated (-3.0 percent); District 26 remained essentially unchanged, ending up very slightly over-populated (+0.3 percent). J.S. App. 9a-10a, 31a-32a.

B. The Commission intentionally reduced population variance before finalizing the legislative districts.

The record also shows that the Commission reduced population inequality between districts. In District 4, for example, the Commission only made changes that caused additional population deviations after its consultant advised that other options would cause undesired consequences, such as splits of towns

and counties. Supp. App. 24-27. And before the Commission approved a final map, it implemented an overall population deviation reduction which substantially reduced the population deviations in many districts. *Id.* at 41-47.

The Department of Justice precleared the final map on April 26, 2012, J.S. App. 35a.

C. The district court's finding that partisanship may have played some role is exceptionally narrow.

The Jurisdictional Statement elides the limited nature of the lower court's findings with respect to partisan motivation. Contrary to the broad assertions in the Jurisdictional Statement, there was no finding that the Commission "systematically diluted votes" of Republicans and "amplif[ied]" Democrat votes "to achieve a partisan advantage," J.S. at 8-9, or that "the [Commission's] actions were based on illegitimate partisan motive," *id.* at 17 The per curiam opinion found that the bipartisan support for most change orders and decisions leading to population deviations undermined the contention that partisan motive drove the process. J.S. App. 38a-40a.

The partisanship finding is narrow and unremarkable: "*some* of the commissioners were motivated *in part* in *some* of the linedrawing decisions by a desire to improve Democratic prospects in the affected districts." J.S. App. 6a (emphasis added). That is, some of the party-appointed commissioners – not the

Commission as a whole – were motivated in part by political interests in some decisions. There is no finding that the Commission itself was politically motivated, nor any finding that a single commissioner was driven solely by partisan motives. Indeed, as Judge Silver's concurrence noted, the allegation of a scheme against Republican interests is "hard to take . . . seriously" given that Republicans have retained strong majorities after each election and are likely to continue to do so throughout the decade. *See* J.S. App. 98a; Supp. App. 8-9.

The only population changes the district court identifies in connection with that finding are the limited changes that Commissioner McNulty (a Democrat) proposed for District 8. *Id.* at 41a-42a. Commissioner McNulty asked the mapping consultant to explore ways to enhance the competitiveness of District 8, which was leaning Republican at the draft-map stage. Supp. App. 13-15. *See* Ariz. Const. art. IV, pt. 2, § 1(14)(F) (competitiveness as a redistricting goal). Because the proposal was limited to enhancing Democratic prospects in one Republican-leaning district, the per curiam order concluded that "partisanship played some role" in District 8's creation. J.S. App. 41a-42a, 78a-79a.

As the district court explained, however, the changes to District 8 gained majority support only after the Commission's advisors suggested that the adjustments to District 8 also might help support the case for preclearance – the new district included territory from a previous ability-to-elect district and

counsel advised that efforts to avoid retrogression for voters in the previous district would help the Commission prove its case. J.S. App. 42a; Supp. App. 38-40. Moreover, the impact of the District 8 changes does not fit Appellants' "systematic dilution" theory because the population changes resulting from those changes were very slight and mixed, with "a small decrease in deviation in one district and small increases . . . in three districts." J.S. App. 79a-80a.

In the end, Appellants' evidence of partisan bias begins and ends with the statistics. The district court rejected this "disparate impact" theory based on the evidence.

ARGUMENT

I. The Court should summarily affirm because existing precedent holds that seeking to comply with the Voting Rights Act is a legitimate state interest.

The majority of the lower court held that the minor deviations in this case were constitutional because they were predominately motivated by the Commission's desire to comply with the Voting Rights Act, and "compliance with the Voting Rights Act is among the legitimate redistricting criteria that can justify minor population deviations." J.S. App. 65a.

The Court should summarily affirm because the district court's holding is fully consistent with existing law. Appellants' arguments to the contrary are meritless.

A. The district court correctly applied existing law to conclude that the minor population deviations were the result of legitimate state policies.

1. Appellants do not contest that they had the burden to prove the Commission's deviations were motivated by an illegitimate purpose.

The Equal Protection Clause requires states to apportion legislative districts "on a population basis." *Brown*, 462 U.S. at 842 (quoting *Reynolds v. Sims*, 377 U.S. 533, 568 (1964)) (internal quotation marks omitted). The Supreme Court, however, has never held that the Fourteenth Amendment requires strict mathematical population equality among districts. *See Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). Rather, the Court has always recognized that deviations are constitutional if they are based on "legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579. "Any number of consistently applied legislative policies" can qualify as a rational state policy in this context, "including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent[s]." *Karcher*, 462 U.S. at 740.

When the deviations in a state legislative plan are minor – those with a maximum variance of less than 10 percent – the Court presumes that the plan is constitutional and does not "require justification by the State." *Brown*, 462 U.S. at 842 (quoting *Gaffney*, 412 U.S. at 745) (internal quotation marks omitted). Deference to the State's policy-making prerogative is important because the intervention of a federal court in state reapportionment is "a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). "[R]edistricting . . . is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978).

Appellants do not dispute that Arizona's deviations are minor and that they had the burden of proof below, including at a minimum the burden to prove that the deviations were not "incident to effectuation of a rational state policy." Although the judges and parties disputed below what precise standard of review should apply, resolving that question is unnecessary to dispose of this appeal.[4]

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[4] The Commission's position (and Judge Silver's) is that to overcome the map's presumption of constitutionality, Appellants have the burden to prove that the "plan results *solely* from the promotion of an unconstitutional or irrational state policy." *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365 (S.D.N.Y.) (quoting *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994)) *aff'd*, 543 U.S. 997 (2004). Given the federalism interests at stake, the complex legislative process involved, and that minor deviations are presumed constitutional,

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2. Appellants could not satisfy their burden because the Commission's desire to comply with the Voting Rights Act is a legitimate redistricting policy.

Based on the voluminous record, the majority concluded that "the deviations in the Commission's plan were largely motivated by efforts to gain preclearance under the Voting Rights Act." J.S. App. 65a. The Jurisdictional Statement does not contend that any of the district court's factual findings were clearly erroneous. Appellants now argue (at 14) that neither political gain nor Voting Rights Act compliance could be legitimate redistricting objectives and therefore "trying to divine which was the 'primary' factor is irrelevant" and "the degree of partisan political intent required [to prove their claim] is not crucial here," J.S. at 16 n.14.

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plaintiffs should have to do more than show an absence of a legitimate state policy to force a legislative do-over. *Cf. Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) ("the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale"). Judge Clifton reasoned that the burden required plaintiffs to show that "illegitimate criteria at least predominated over legitimate considerations." J.S. App. 64a. The per curiam order applied Judge Clifton's standard, reasoning that because the Commission prevailed under that standard it would also prevail under the more deferential standard. *Id.* at 63a-64a n.10. In dissent, Judge Wake stated that deciding the precise test "should be left for a case in which it would matter." J.S. App. 139a. The Commission agrees.

Appellants' argument that compliance with the Voting Rights Act does not justify even minor population deviations is incorrect. This Court has long assumed that compliance with the Voting Rights Act is a compelling state interest capable of justifying districting decisions subject to strict scrutiny. *See Abrams*, 521 U.S. at 91; *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion). For § 5 compliance in particular, eight justices recently held that compliance was a compelling state interest (and thus necessarily also a rational one). *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.); *id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.). As Justice Scalia explained, "[i]f compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause." *Id.* at 518.

In addition, Arizona also has a legitimate interest in ensuring compliance with the Voting Rights Act because compliance ensures that the voter-approved Commission's plan is used in elections rather than one a federal court adopts. *See, e.g., Growe v. Emison*, 507 U.S. 25, 34 (1993) (reaffirming that federal courts

should whenever possible "leave[ ] with the States primary responsibility" for redistricting).

B. Appellants' arguments that compliance with the Voting Rights Act could not justify Arizona's minor population deviations lack merit.

Appellants raise several arguments meant to delegitimize the Commission's decisions. They contend that this Court's opinion in *Shelby County* renders what was once a legitimate governmental objective irrational and illegitimate, even though *Shelby County* does not undo the validity of § 5 or the possibility of preclearance. *Shelby County*, 133 S. Ct. at 2631. Appellants further argue that States must maintain strict mathematical population equality when complying with the Voting Rights Act, even though the Supreme Court has rejected the notion that there is a right to strictly equal state legislative districts and has warned that "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge" other important considerations. *Gaffney*, 412 U.S. at 749. Failing that, Appellants argue that the Commission's redistricting decisions must have been a pretext because some of the districts do more than Appellants say is necessary for preclearance, an argument that is deeply flawed for many reasons, including (as the district court noted) that the issue of retrogression was not before the district court. J.S. App. 73a-74a. The district court properly rejected these arguments and there is no compelling reason for this Court to consider them.

1. *Shelby County* does not render the Commission's objective of obtaining preclearance irrational and illegitimate.

Appellants argue that this Court's decision in *Shelby County* should apply retroactively to render the Commission's efforts to comply with § 5 and obtain preclearance illegitimate. The district court correctly rejected this argument. *See* J.S. App. 69a-72a.

First, Appellants' position overstates *Shelby County*. The Court held that the coverage formula in § 4(b) is unconstitutional. 133 S. Ct. at 2631. The "decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2" and "issue[s] no holding on § 5 itself, only on the coverage formula." *Id.* *Shelby County* does not call into question the substantive objectives underlying § 5, or otherwise make avoiding retrogression an illegitimate state policy. *See id.* (noting that Congress could draft a new coverage formula and that "any racial discrimination in voting is too much"). Nor does the Court suggest that seeking preclearance is by itself unlawful, only that Congress may no longer force jurisdictions to do so based on the current coverage formula. Indeed, *Shelby County* leaves in place the § 3(c) "bail in" provision, which allows a court to impose a preclearance requirement if a State has engaged in intentional discrimination. *See* 52 U.S.C. § 10302(c); Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping:*

Evidence and Implications for VRA Preclearance After Shelby County, 102 Cal. L. Rev. 1123, 1176 (2014) (predicting that parties will turn to bail-in procedures if Congress does not revise the coverage formula). Thus, even applying *Shelby County* retroactively, there is nothing that the Commission did that would become unlawful.

That *Shelby County* does not purport to hold § 5 or preclearance itself unconstitutional separates this case from the principal case on which Appellants rely, *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993). *See* J.S. at 29-30. In that case, the Court held that its earlier decision on the constitutionality of a kind of tax scheme should be given retroactive effect, explaining that the Supreme Court's ruling on federal law "is the controlling interpretation of federal law and must be given full retroactive effect in all" pending cases. 509 U.S. at 97. The only "controlling interpretation of federal law" is that Congress may not subject States to preclearance using the current coverage formula. Had *Shelby County* held that designing districts to avoid retrogression and without discriminatory intent was an impermissible governmental objective, then this case may well come under *Harper*. But that is not what *Shelby County* did.

For the same reasons, Appellants are mistaken when they invoke the dissenting judge's warning that allowing the Commission's plan to remain in force would "give continuing force to Section 5 despite the unconstitutionality of applying it anywhere." J.S. at 30. *Shelby County* does not hold § 5 unconstitutional,

and nothing in *Shelby County* (or any other case) supports the notion that a map designed to comply with § 5 would be unconstitutional.

Second, Appellants' argument misapprehends the rational basis inquiry. In this context, "the proper equal protection test is not framed in terms of 'governmental necessity,' but instead in terms of a claim that a State may 'rationally consider.'" *Mahan v. Howell*, 410 U.S. 315, 326 (1973) (quoting *Reynolds*, 377 U.S. at 580-81). *Reynolds* asks whether there was an "honest and good faith effort" to achieve population equality, not whether decisions were, in retrospect, inaccurate even if made honestly and in good faith. *Mahan*, 410 U.S. at 324-25. In other words, the relevant question is not whether Arizona was certainly required (in light of *Shelby County*) to seek preclearance; the question is whether its decision to do so was irrational.

It should be beyond question that Arizona had a rational interest in complying with a federal law that was a prerequisite to implementing the State's new districts. The Commission was not free to disregard its obligations under the Voting Rights Act, and like other federal statutes, the Act is "presumed constitutional." *Vera*, 517 U.S. at 991-92 (O'Connor, J., concurring); U.S. Const., art. VI, cl. 2. Beyond presuming its constitutionality, this particular statute had been tested, and until *Shelby County*, the Court repeatedly affirmed the constitutionality of the Voting Rights Act, including § 4. *See Shelby County*, 133 S. Ct. at

2620 (collecting cases). This backdrop gave the Commission a rational, if not compelling, basis to comply with § 5.

Appellants' position would put Arizona, and all other § 5 jurisdictions, in the "impossible" bind that Justice Scalia warned about in *LULAC*, forcing Arizona to risk non-compliance with § 5 out of a concern that a court would later say (contrary to all existing law) that § 5 is an unlawful legislative objective. *See* 548 U.S. at 518. But even when strict scrutiny applies under § 2 claims, "deference is due to [the States'] reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Vera*, 517 U.S. at 978 (plurality opinion). That kind of deference is surely warranted here, where Arizona is performing one of "the most vital of local functions," *Miller*, 515 U.S. at 915, and where Arizona's previous § 5 problems made the Commission well aware of the consequences of a failure to prove non-retrogression. This decade, for the first time since Arizona became a covered jurisdiction, the Department precleared Arizona's legislative redistricting plan on the first submission, without any objection or request for additional information. This enabled the State to implement its new districts without the need for emergency judicial relief and affirmed the Commission's decision to stress compliance with Section 5 when redrawing the districts.

2. The Equal Protection Clause does not require strict population equality.

Appellants assume that the "constitutional imperative on population equality" means that the Constitution requires or highly values strict population equality. It does not. Appellants invoke *Reynolds*, but even in that early case, the Court held that "individual's right to vote . . . is unconstitutionally impaired when its weight ***is in a substantial fashion*** diluted." *Reynolds*, 377 U.S. at 568 (emphasis added). Appellants' argument disregards the line of cases holding that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case . . . so as to require justification by the State." *Brown*, 426 U.S. at 842 (quoting *Gaffney*, 412 U.S. at 745) (internal quotation marks omitted). As explained in *Gaffney*, elevating strict mathematical equality above other concerns risks subjecting State legislative discretion to invasive federal oversight "in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature." 412 U.S. at 749.

Appellants counter that the Voting Rights Act itself and Department of Justice regulatory guidance both state that § 5 "does not require jurisdictions to violate the one-person, one-vote principle." J.S. at 32-33 (quoting 76 Fed. Reg. 7470, 7471). That the Voting

Rights Act does not require States to violate the Constitution is true but irrelevant. Appellants presume the flawed premise that "the one-person, one-vote principle" guarantees strict population equality.

If anything, the Department's guidance undermines Appellants' argument. The section Appellants cite contains the Department's discussion of "Alternative Retrogressive Plans," an issue that comes up when a State seeking preclearance has to prove "that a less-retrogressive plan cannot reasonably be drawn." 76 Fed. Reg. 7470, 7472. After stating that the Department would not require a jurisdiction to violate the "one-person, one-vote principle," it explains that for a congressional plan, the Department would not consider an alternative plan to be reasonable if it "would require a greater overall population deviation." *Id.* For "state legislative and local redistricting," however, "a plan that would require ***significantly*** greater overall population deviations is not" a reasonable alternative. *Id.* (emphasis added). The addition of the word "significantly" to the sentence conforms the Department's guidance to the law governing non-federal districting: legislative plans with only minor (*i.e.*, insignificant) deviations are presumed to be constitutional and do not require justification.

Moreover, Appellants' position would result in an illogical set of rules for States. Under Appellants' argument, a State would have to adhere to strict population equality when deciding how to comply

with the Voting Rights Act, but could allow the same minor deviations at issue here if caused by efforts to protect incumbent politicians, adjust the geographic compactness of the district, or accommodate "[a]ny number of consistently applied legislative policies." *Karcher*, 462 U.S. at 740.[5]

Beyond illogical, Appellants' rule would value the "statistical niceties involved in equalizing individual voting strength," *Gaffney*, 412 U.S. at 748, at the expense of the State's flexibility in deciding how to accomplish a core sovereign function. This case illustrates the problem. When exploring ways to strengthen the minority voters' ability to elect candidates of choice in District 4, the Commission resorted to minor de-population only after its consultant explained that other options would split up towns and compromise other legitimate redistricting goals. Supp. App. 24-26. Under Appellants' rule, the Commission would have been forced to choose between compromising its other goals or risking non-compliance with federal law, all in service of avoiding "insignificant population variations." *Gaffney*, 412 U.S. at 748.

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[5] *Karcher* itself implies that "preserving the voting strength of racial minority groups" could justify deviations in a congressional districting plan. *Karcher v. Daggett*, 462 U.S. 725, 742 (1983). The Court rejects that rationale not because it is incapable of justifying deviations but because the evidence showed that the voting-strength goal was "not related in any way" to the deviations at issue. *Id.* (citation omitted).

3. The district court correctly held that whether the Commission did more than was strictly required to comply with § 5 is not at issue, and Appellants' race-based arguments are wrong in any event.

Finally, Appellants contend that the Commission's efforts to ensure preclearance must have been illegitimate because the Commission has not proved that "its redistricting scheme . . . [was] necessary – or even helpful – for obtaining preclearance." J.S. at 33-37. The chief contention seems to be that the Commission went beyond what would be required and improperly created "additional crossover and influence districts" to unnecessarily boost the chances of preclearance. *Id.* at 34. In making this argument, Appellants also contend that the Commission "us[ed] race as the predominant criteria" and imply that the Commission must satisfy some version of strict scrutiny. *Id.* at 34-36. The Court should bypass these scattershot arguments for multiple reasons.

1. The district court correctly rejected Appellants' similar argument below. J.S. App. 73a-75a. As the court explained, the issue at trial was whether legitimate rationales justified population deviations, not whether "the Commission might have been able to adopt a map that would have precleared with less population deviation." *Id.* at 75a.

Moreover, Appellants did not give "the court a basis to independently determine that there existed only eight ability-to-elect districts in the benchmark

plan," a fact necessary to determine what was minimally required to avoid retrogression.[6] *Id.* at 73a. In other words, this argument is not properly part of this case and not suitable for the Court's review.

2. The argument depends on applying some version of strict scrutiny, which the district court correctly refused to do. J.S. App. 64a. Appellants quote the strict scrutiny standard and simply assume it applies.[7]

Neither the law nor the facts supports Appellants' assumption. In racial gerrymandering claims, strict scrutiny applies only if "race was the predominant factor" to which other districting interests are subordinated. *Miller*, 515 U.S. at 916. As the district court observed, the strict scrutiny standard applicable in a racial gerrymandering case should not apply in this context, where "the Supreme Court has made clear that [a federal court] owe[s] state legislators

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[6] Appellants now contend (without citation to the record) that the Commission "identified eight minority ability-to-elect districts in its draft plan." J.S. at 35. To the extent this sentence is intended to imply that the Commission identified ***only*** eight such districts, it is inaccurate. The draft plan identified ten.

[7] Appellants inaccurately cite *Miller v. Johnson* and *LULAC* for descriptions of the standard they seek to apply. The quote attributed to *Miller* (J.S. at 33) and the block quote described as the Court's holding in *LULAC* (J.S. at 34) both come from Justice Scalia's partial concurrence and partial dissent in *LULAC*, not the Court's opinion. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 518-19 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.).

substantial deference." J.S. App. 64a (citing *Gaffney*, 412 U.S. at 749).

Furthermore, Appellants have not explained how "race was the predominant factor" in the Commission's districting decisions. "Strict scrutiny does not apply merely because redistricting is performed with consciousness of race." *Vera*, 517 U.S. at 958 (plurality opinion). The evidence must show that "traditional districting criteria [were] *subordinated to race*." *Id.* at 962. Although the Jurisdictional Statement asserts (without record citation) that the Commission "used racial and ethnic gerrymandering" (at 37), and that the Commission "admits that it used race as a predominant motive" (at 39), these are not facts they proved to the district court and the issue is not presented in this case. To the contrary, as the district court observed, the Commission used a functional analysis that, for example, considered candidate performance to assess the ability of minorities to elect candidates of choice. *See* J.S. App. 26a (explaining Commission's use of formal and informal racial polarization data); *id.* at 73a-74a (noting Commission performed functional analysis). Moreover, Appellants' theory going into trial was that all districting criteria were subordinated to politics, not race.[8]

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[8] In addition, Appellants lack standing to raise the sort of race-based claim that would be subject to strict scrutiny because they have not alleged they reside in a district underpopulated because of race or that they were "assigned to [their] district[s] as a direct result of having 'personally been subjected to a racial

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3. Even assuming Appellants could state a cognizable claim based on a theory that the Commission mistakenly over-complied with § 5, no evidence supports their claim. Their argument has two incorrect premises: (1) that the benchmark plan used to measure retrogression had eight benchmark ability-to-elect districts, and (2) that "coalition districts" do not count under § 5.

As to the number of benchmark districts, the record supports the Commission's conclusion that the Department of Justice could conclude that the benchmark plan had ten ability-to-elect districts. *See, e.g.*, J.S. App. 77a-78a; Supp. App. 20-21. More importantly, nothing in the record establishes Appellants' position that there were eight such benchmark districts. Indeed, Appellants did not perform any independent functional analysis needed to determine which districts provided minority voters the ability to elect candidates of their choice. J.S. App. 73a-74a; Supp. App. 10-12.

As to so-called "coalition districts," Appellants are simply incorrect when they suggest that the existence of an ability-to-elect district depends on whether a district has a specific percentage of minority voting age or citizen voting age population (or "CVAP"). J.S. at 35-36 (arguing that Districts 24 and

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classification.'" *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (quoting *United States v. Hays*, 515 U.S. 737, 745 (1995)). *See* Doc. 95 at 5-7.

26 were "flawed" because the Hispanic population was "short of a majority"). *See Texas*, 887 F. Supp. 2d at 140 (affirming that district with less than 50 percent CVAP could qualify as ability-to-elect district); *see also* 76 Fed. Reg. 7470, 7471 (describing Department's use of "functional analysis" that does not turn on "any predetermined or fixed demographic percentages").

II. Appellants' partisanship argument does not raise a substantial question for review.

Appellants' partisanship argument depends on assertions that are not at issue on appeal and that do not merit further review. Moreover, under the facts of this case, Appellants' arguments are incorrect under existing law. Assuming they are valid questions at all, whether there is a 10 percent "safe harbor" or whether partisan-driven deviations are unlawful are questions that the Court should leave for another case in which the answers might matter based on the lower court's factual findings.

A. The district court assumed that partisanship could not justify population deviations but rejected Appellants' factual premise regarding partisanship, a finding Appellants do not challenge as clearly erroneous.

Reading the Jurisdictional Statement, one might think that Appellants prevailed at trial. They contend,

for example, that the Commission's "purpose was to dilute Republican votes and amplify Democrat votes," J.S. at 19, and that "the reason for deviation[s] is an effort to gain advantage for [a] political party," J.S. at 18. From this flawed premise, Appellants ask the Court to review the merits to judge the legality of "systematic state-wide population deviations motivated by partisan advantage." *Id.* at 20.

But the district court rejected Appellants' theory that partisan gain caused the population deviations, as explained above (at 23-24). Although the dissent would have gone farther, Judge Clifton would only go so far as to find that partisan gain played "some role" in "some" decisions, but that partisanship did not "predominate[ ] over legitimate factors." J.S. App. 6a, 79a. That much narrower finding is the majority position reflected in the per curiam opinion, a finding that Appellants nowhere contend was clearly erroneous.[9] The factual premise of the issues Appellants want the Court to decide are not part of this case.

The legal issues Appellants' raise with regard to partisanship are likewise irrelevant. Appellants argue that there is no "safe harbor" for population

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[9] To the extent Appellants intend to argue that the majority committed clear error as it made its factual findings, they have waived that argument by failing to make it more explicitly. *E.g.*, *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) (Calabresi, J.). Even had they not, the majority's "account of the evidence is plausible in light of the record viewed in its entirety." *Anderson*, 470 U.S. at 573-74.

deviations. J.S. at 20-22. The Commission has never argued, and the district court did not hold, that there is an "absolute safe-harbor for arbitrary or discriminatory practices." J.S. at 22.

Appellants further argue that the Commission's "systematic state-wide population deviations motivated by partisan advantage" violate equal protection principles. J.S. 20, 24-26. The court did not need to decide whether the partisan motivation could justify population deviations because it "conclude[d] that the redistricting plan here does not violate the Fourteenth Amendment whether or not partisanship is a legitimate redistricting policy." J.S. App. 62a. Thus, the district court "assume[d] without deciding that partisanship is not a legitimate reason to deviate from population equality" and still found in the Commission's favor. J.S. App. 6a.

Consequently, because they do not matter to the outcome, this case is not the one for the Court to address the partisanship issues Appellants raise.

B. The district court's narrow finding that partisanship played "some" non-predominant role is of no constitutional significance.

Summary affirmance is also appropriate because precedent supports the district court's holding that its limited finding of partisanship could not turn the Commission's districting decisions as a whole unconstitutional.

This Court has repeatedly recognized that politics has an unavoidable and constitutional place in the redistricting process. In *Vieth v. Jubelirer*, eight Justices agreed that "politics as usual" is a "traditional [redistricting] criterion, and a constitutional one, so long as it does not go too far." *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (citing *Vieth v. Jubelirer*, 541 U.S. 267, 285-86 (2004) (plurality opinion); *id.* at 307 (Kennedy, J., concurring in the judgment); *id.* at 344 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting)). In the racial-gerrymandering context, this Court has considered political motivation as a defense. *Hunt v. Cromartie*, 526 U.S. 541, 549-51 (1999); *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). And in *Gaffney*, the Court explained that "[p]olitics and political considerations are inseparable from districting and apportionment." 412 U.S. at 753.[10]

These precedents establish that the presence of political motivations is an expected and perfectly constitutional ingredient of the redistricting process. It should not be surprising (much less constitutionally suspect) that an individual legislator might favor redistricting policies that also align with the legislator's political interests, as the district court found

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[10] *See also Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 310-11, 315 (E.D.N.Y. 2003) (rejecting vote dilution claim where "gravamen of the complaint is that the map was drawn to favor Democrats" because, in light of *Gaffney* and *Hunt*, an allegation of "political motivation does not, standing alone, implicate the equal protection clause.").

occurred here with respect to a single commissioner's proposal to make District 8 marginally more competitive. *See* J.S. App. 78a-79a. *See also* Ariz. Const. art. IV, pt. 2, § 1(14)(F) (establishing competitiveness as a redistricting objective). As Justice Scalia observed, to say that "politics as usual" is "go[ing] too far . . . seems . . . more likely to encourage politically motivated litigation than to vindicate political rights." *Cox*, 542 U.S. at 952 (Scalia, J., dissenting). Where, as here, the population deviations are minor and evidence of partisanship is minimal and aimed solely at increasing a district's competitiveness, federal courts should not wade into the "political thicket" and "become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." *Gaffney*, 412 at 750.

C. This case is nothing like *Larios v. Cox*, the sole case to invalidate maps with minor population deviations.

The Court's summary affirmance of *Larios v. Cox* does not alter this analysis. 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947. In *Larios*, the challengers produced evidence of intentional misuse of population deviations for improper ends. The legislature conceded that it had "pushed the deviation as close to the 10% line as it thought it could get away with." *Id.* at 1352. Indeed, "dozens of districts c[a]me close to the 5% line." *Id.* The legislature believed that the ± 5 percent range was an unimpeachable safe

harbor within which deviations "did not have to be supported by any legitimate state interest." *Id.* at 1325.

The legislature abused the 10 percent window to deliberately push a number of intentionally partisan goals, including an "intentional effort to allow incumbent Democrats to maintain or increase their delegation" through underpopulation and "pairing numerous Republican incumbents against one another." *Id.* at 1329. Rather than attempt to achieve "a districting plan that would achieve a rough approximation of the statewide political strengths," *Gaffney*, 412 U.S. at 752, Georgia's efforts "led to a significant overall partisan advantage . . . in the electoral maps." *Larios*, 300 F. Supp. 2d at 1331.

Even with such strong evidence of intentional partisanship, however, the court struck down the map because of the legislature's blatant regionalism and targeting of one party's incumbents. *Id.* at 1342. It did not need to decide "whether or when partisan advantage alone may justify deviations in population" because the "partisan interests are bound up inextricably" with the plainly illegitimate "interests of regionalism and [one-party] incumbent protection." *Id.* at 1352; *see also id.* at 1342 ("Supreme Court has long and repeatedly held that favoring certain geographic regions of a state over other regions is unconstitutional.").

Larios has nothing in common with this case. Most significantly, the Commission never acted as

though the 10 percent deviation window was an unimpeachable safe harbor where deviations could be used for improper ends without justification. The Commission understood just the opposite, having been warned that the Commission needed to articulate legitimate reasons for changes and should venture to minimize the deviations. Supp. App. 29-30, 35-37. In addition, despite a full trial, the district court found none of the kind of intentional and rampant partisan maneuvering the court describes in *Larios*. Moreover, the Commission made significant "good faith effort[s] to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. For instance, the Commission implemented a change to the lines for the sole purpose of reducing population deviations. Supp. App. 41-47. In other words, none of the features that made the population deviations in *Larios* unconstitutional exist in this case.

III. Appellants' claims regarding § 2 and "influence" districts have nothing to do with this case.

Appellants' Question Presented three purports to argue that § 2 of the Voting Rights Act does not justify the Commission's districting plan. J.S. at 39-41. It is unclear what the point of the argument is, but it is not relevant to the appeal and should be disregarded. Arizona's compliance with § 2 is not at issue, was not tried or decided below, and nothing Appellants assert merit this Court's attention.

To the extent Appellants argue that *Bartlett v. Strickland*, 556 U.S. 1 (2009), discredits the Commission's decision to promote Districts 24 and 26 as part of its proof of non-retrogression under § 5, or supports their contention that the Commission's districting was done for irrational or illegitimate purposes, they are wrong. The "holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion." *Id.* at 23 (plurality opinion). And in *Bartlett*, the plurality opinion expressly stated that the standards for § 5 and § 2 are different. *Id.* at 25. As later courts recognized, the Supreme Court "has long acknowledged the existence of coalition and crossover districts, recognizing at times that they can provide the means for minority voters to elect their candidates of choice." *Texas*, 887 F. Supp. 2d at 148 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994); *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993)).

CONCLUSION

The Court should summarily affirm the district court or dismiss the appeal for want of a substantial federal question.

Respectfully submitted,

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Attorneys for Appellee Arizona Independent Redistricting Commission

November 13, 2014

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Wesley W. Harris, qualified elector of the State of Arizona, et al., Plaintiffs, vs. **Arizona Independent Redistricting Commission, et al.,** Defendants.	CV-12-00894-ROS-NVW-RRC Phoenix, Arizona

BEFORE: THE HONORABLE ROSLYN O. SILBER, CHIEF JUDGE

THE HONORABLE NEIL V. WAKE, JUDGE

THE HONORABLE RICHARD R. CLIFTON, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BENCH TRIAL

* * *

[50] [RICHARD STERTZ] A. I would hasten to say that to use words like being never advised. And I say that because there was – we would rely – again, we would rely heavily on the representations that were put forth by legal counsel and their consultants and in doing so, we would hear from them and say we are – we don't want to overcompensate. We want to

not hit the minimum requirements either. We – the priority out of this Commission from the very beginning was – from this Commissioner's perspective, was to follow all aspects of the constitutional requirements, one of which is the meeting the intent of the Voting Rights Act in Section 5 which had to do with retrogression and that was a key component, is that we did not want to ever look at a map where we had retrogression designed into the map.

* * *

[246] Q. And, in fact, if you turn the page and go to the change, let's get the numbers up. Let's go to District 1, the top of it.

So in order to keep the county whole on this particular map change, you see the District 1 is going from an under population of 5,165 to being overpopulated. True?

[RICHARD STERTZ] A. True.

Q. And that change is being made because the interest you are trying to do is to keep Cochise County whole, correct?

[247] A. Again, I can't answer that as a yes or no.

Q. I thought you told me on direct examination you heard a lot of comments from people that wanted to keep Cochise County together.

CHIEF JUDGE SILVER: Mr. Campbell, I'm having trouble hearing you again.

BY MR. CAMPBELL:

Q. I thought on direct examination you told me that you heard a lot of comments from Cochise County that they wanted to keep Cochise County whole. True?

A. Yes.

Q. And if you look at what happens to the Hispanic population in Cochise County, you will see it's the third one down, Hispanic, it goes from 21 percent up to 29 percent. True?

A. True.

Q. And that's because that tail had a heavy concentration of Hispanic population. True?

A. True.

Q. Okay. Let's go down to what happens to District 2.

Now District 2 is a Voting Rights Act district, right?

A. Yes.

Q. And you see that it deviates in ideal population. It goes from minus 200, which is nearly almost equal, you would agree with me on that, right?

A. Yes.

[248] Q. And it actually is now underpopulated by 8,700 people, correct?

A. At that change report, yes.

Q. At that change report. And that happens because you are trying to keep Cochise County whole and not give those Hispanics over to District 2. True?

A. Again, I can't answer that as a yes or no. If you ask if the keeping it whole was one of the desires, then the answer would be yes.

* * *

[249] Q. And Judge Clifton can't see this, but the other judges will know that Flagstaff is up here in District 6, correct, near the Schultz Flood Area?

[RICHARD STERTZ] A. That's correct.

Q. And the community in the Schultz Flood Area didn't want to be in District 7, correct?

A. There was the desire to not be in District 7.

Q. District 7 was the Native American district, correct?

A. Correct.

Q. And they wanted – they thought their interests were more in line in Flagstaff and wanted to be put in Legislative District 6. True?

A. That's the testimony that they gave, yes.

Q. And the Commission accommodated that. True?

A. True.

Q. And the result of that, though, is it was moving population from Legislative District 7 into Legislative District 6, right?

A. True.

* * *

[265] Q. All right. Let's go to the Voting Rights Act. Okay?

You wanted to comply with the Voting Rights Act. True?

[RICHARD STERTZ] A. True.

Q. You wanted to do everything you could do to get preclearance on the very first try. True?

A. True.

* * *

[270] [RICHARD STERTZ] A. We were following, in my opinion, I was following clearly with what was being delivered to us by legal counsel and their consultants. They said that 10 was going to be the magic number that we needed to hit. So when 10 passed, 10 was used, and it cleared. Then all of the recommendations that we had [271] been given were correct.

* * *

[308] Q. All right. I would like you to turn to your deposition, page 246. And let's start at line 13. Let me see if I asked you these questions and you gave me these answers.

QUESTION: I realize these are small, incremental changes, but it was your understanding that the purpose of this change was to make it a better ability-to-elect district?

[RICHARD STERTZ] ANSWER: This was a questionable change, because of the area of Yuma that got shifted from Yuma into – which is an ability-to-elect district to a highly now underpopulated Republican district 13 has got a much greater amount of Republicans now in it, and there was an offload at that part of the city that is a highly Republican area that got offloaded from 4 to 13.

I have to tell you – let me just back up a little bit here. That's a natural consequence of improving the ability-to-elect districts is you need to offload Republicans. Because typically, we found 70, 74 percent of Hispanics are registered Democrats. So by offloading the Republicans, you're increasing the ability-to-elect. And you are increasing the [309] Hispanic population in a particular district or in a particular area. So offloading blocks of Republicans into other districts enhances two things. It enhances the voting data to creep away from any view of retrogression, second, it does strengthen the ability to elect, because in a Democrat district, they're going to elect Democrats. So 4 is two and one. They've got a state senator and two house members that were elected.

Correct?

MR. CANTELME: Objection, Your Honor. Improper impeachment. No inconsistency under Rule 32(A)(2).

CHIEF JUDGE SILVER: Overruled.

BY MR. CAMPBELL:

Q. Did you give me those answers to those questions?

[RICHARD STERTZ] A. I did.

* * *

[316] Q. All right. And in public hearings you heard testimony from non-Hispanic Whites in the eastern area of Arizona that they didn't want to be in Legislative District 7; correct?

[RICHARD STERTZ] A. To the best of my recollection, yes.

Q. And let's go to the tentative final map which is going to be Tab 5 in the map book. Do you see that Greenlee County has been moved into District 1 with Cochise County?

A. Correct.

Q. That underpopulates, to some extent, Legislative District 7 and move population into Legislative District 1; true?

A. True.

Q. And that would satisfy a community of interest the [317] Greenlee County residents articulated; true?

A. True.

Q. It would also keep counties whole. You're not splitting Greenlee County; true?

A. Under one of the requirements of the Constitution.

Q. And then over on the other end of the state, I think we went through yesterday where parts of Mohave County were taken out of the Legislative District 7 and put into Legislative District 5; true?

A. True.

Q. And that would improve keeping counties whole; correct?

A. Again, one of the requirements mandated by the Constitution.

* * *

[326] Q. Let's go down to the chart down below. 2004 election, 18 Republicans, 12 Democrats, correct, in the Senate?

[RICHARD STERTZ] A. Yes.

Q. 17, 13 in 2006?

A. Yes.

Q. 17, 13, in 2008?

A. Yes.

Q. And then let's go to 2010, it's 21, 9?

A. It was an outlier election year.

Q. Right. Let's go to the first sentence of the next paragraph or just blow up the next paragraph.

You see Mr. Cantelme says that the averages were skewed by the 2010 election results, the product of an atypical wave election influenced by national politics and by calls from some politicians to boycott Arizona. Do you see that?

A. Yes.

Q. So in the 2012 election in the Senate it's 17 Republicans [327] and 13 Democrats; right?

A. Yes.

Q. Just the way it was throughout the decade of the 2000s except for the 2010 election; correct?

A. Yes.

Q. And it's your opinion, sir, that the Republicans will hold the Senate and the House until 2020; correct?

A. Yes.

* * *

[669] Q. Now, in your deposition I asked you whether your opinion was the only logical explanation for the underpopulation of Legislative District 7

was to increase Democratic voting strength. Do you remember asking you that question?

[THOMAS HOFELLER] A. No.

MR. CANTELME: Page and line, please.

BY MR. CAMPBELL:

Q. Do you remember in your deposition withdrawing your opinion as to Legislative District 7?

A. Which opinion was that? The one you just mentioned?

Q. Yes.

A. Yes, I think I did.

* * *

[735] Q. Mr. Hofeller, did you do a functional analysis with respect to any district in this case under a Section 5 analysis?

[THOMAS HOFELLER] A. No.

MR. CANTELME: Your Honor it's "Dr. Hofeller."

[736] MR. CAMPBELL: I'm sorry.

CHIEF JUDGE SILVER: Remember, you can call him "Doctor." He likes it.

THE WITNESS: I don't really care.

BY MR. CAMPBELL:

Q. Doctor, you understand the Commission had to do a functional analysis of the district before submitting a plan to the Department of Justice. True?

A. True.

Q. And you understand that the Department of Justice doesn't tell you where the fence is with respect to hitting a home run. True?

A. That's true. They will often tell you when they reject you where it was, but not ahead of time, sort of like the tax man.

Q. But the problem the Commission has with getting preclearance is anticipating what the Department of Justice will require. True?

A. That certainly has to be part of their deliberation, yes.

Q. And to be fair to the Commission, they have to exercise judgment as to how many Voting Rights Acts districts they should draw to make sure they get preclearance. Isn't that fair?

MR. CANTELME: Objection. Calls for a legal conclusion.

CHIEF JUDGE SILVER: Overruled.

[737] THE WITNESS: I think they have to make that judgment, but it has to be based on logical deduction.

* * *

[776] Q. And Mr. Adelson advised the Commission that it could depopulate the minority districts for purposes of compliance with Section 5. True?

[LINDA MCNULTY] A. He advised that it was an accepted way to strengthen [777] certain of the minority districts. Yes.

Q. So long as you stayed within 5 percent up or 5 percent down?

A. I don't think he gave us a hard and fast rule that way, but he said that we could not deviate by 10 percent, that we needed a valid reason for doing it, but that the Courts had ruled that it was an accepted way of strengthening minority districts.

Q. And the Commission proceeded accordingly. True?

A. Yes. That's correct.

* * *

[778] Q. And receiving preclearance from the Department of Justice on its first attempt was important to you as a commissioner?

[LINDA MCNULTY] A. Yes, it was. It was very important to me.

* * *

[779] Q. And let me – from draft map to final, the Commission was trying to strengthen minority voting power in certain districts, is that correct?

[LINDA MCNULTY] A. Yes. That's correct.

Q. And was that effort focused on Districts 4, 24, and 26? Is that correct?

A. That's correct. I had asked Mr. Adelson several times to help us understand which districts he thought were most important for us to focus on, and those were the three that he thought were the priority.

* * *

[791] Q. Briefly, on Districts 8 and 11, you attempted to make District 8 more competitive, is that correct?

[LINDA MCNULTY] A. Yes.

Q. Let's look at a census place map of LD 8. That's in the notebook, and that's at Tab 7C. Just to get a better sense of what's in that, because I wanted to talk not about the numbers, but just about communities of interest in that district and what that district is comprised of.

A. Okay.

* * *

[792] Q. From draft map to final, do you recall moving – did that affect the community of SaddleBrooke?

[793] [LINDA MCNULTY] A. Yes. My recollection is that I had specifically in a public meeting asked Willie Desmond to look at these two districts and to determine whether they could be adjusted to increase the competitiveness of one of the districts. As we had approved them in the draft map, the Republican registration and the Republican effectiveness, the gap between Republican and Democrat was, I think, 11 percent in one district and 13 in another based on our competitive measures.

And I also wanted to – I had in mind and had raised a couple times in the course of our work keeping the Copper Corridor communities together and seeing if we could preserve any opportunity to vote there. I know that's a longer answer than you wanted.

But my recollection is that at the end November or beginning of December I was flying back and forth to the east coast a lot right about then. I had asked Willie in a meeting to do that. And on December 5th I was not at the hearing, but he presented the map in which he had made the changes. And one of the changes he had made, in order to accomplish making one of the districts more competitive, was to combine the towns of SaddleBrooke, Marana, and Oro Valley into 11 and they had previously been split in our draft

map with a couple of them in one and a couple of them in another. And so this did combine those into 11.

* * *

[984] Q. In order to gain preclearance, does it help a state like Arizona, especially with its history of objections, to show that it is doing everything it can to improve the district?

[BRUCE CAIN] A. Absolutely.

Q. When Arizona is preparing its preclearance submission, does it know what numbers it needs to hit on each of its districts to satisfy the Department of Justice?

A. No. Unfortunately, they don't send you a letter and tell you aim for 8, aim for 9, aim for 10.

* * *

[985] Q. In your opinion is it fair to call these minor population deviations?

[BRUCE CAIN] A. Yes. They are – the average is 2.2, which is very much within the norm for Legislative Districts. If you look across the states there were some states that had much higher deviations as I point out in my report. There were 12 states that had larger deviations as of a couple months ago when I looked at the NCSL data. They are probably more now. And the 2.2 is really a quite moderate level.

Q. In your experience, have other states used minor population deviations to improve the ability to elect candidates of choice [986] in Voting Rights Act districts?

MR. CANTELME: Objection. Foundation. Time and state.

CHIEF JUDGE SILVER: Sustained.

BY MR. CAMPBELL:

Q. Have you worked in other states with respect to Section 5 Voting Rights Act issues?

A. California has Section 5 counties. I believe Arizona is the only Section 5 state that I personally worked with.

Q. Okay. Did you deal with any population deviations in county drawing?

A. Yes, but it was never an issue like this.

Q. So your knowledge is just academic?

A. It's academic, I'm afraid.

Q. With that foundation, I will see if we get an objection.

With that foundation, are you aware of other states that use minor population deviations to enhance the ability to elect candidates of choice in Voting Rights Act districts?

MR. CANTELME: Same objections.

CHIEF JUDGE SILVER: Overruled.

THE WITNESS: There are, yes. I looked at some of the states that had population deviations that were greater than nine, and indeed they were greater than Arizona. And several of the other Section 5 states, and I put them into the report, had had larger deviations. And when you go in you see some [987] number of them are minority districts.

* * *

[1070] Q. So the Commission completed its work – so you completed it so after this you adopted the final map in January of 2017 -excuse me 2012.

[COLLEEN MATHIS] A. Correct.

Q. And then that got pre-cleared?

A. Yes. And it was – that was great news. It was something I was very proud of. And one of the reasons my stated goal from the beginning was to pass pre-clearance from the first try is Arizona had never done that. And I felt like getting it out from under that track record of never passing preclearance on the first try was a goal that this Commission should strive for and when it happened I was extremely proud and pleased.

* * *

[1085] Q. Now, let's go back to the 11-29 – I told you I would come back to this – the 11-29 transcript of the Commission meeting. Page 117, line 4.

It says – now, again you testified that you were at this meeting. True?

[COLLEEN MATHIS] A. True.

Q. "Commissioner Stertz, I think that a lot of what we're talking about today as far as evaluating turnout, electoral success, registration rates, for example, looking at combining voters from districts where they cannot elect, that was a big issue in Texas. In Texas, what Texas did" – let's go to 118. Line 18. I apologize. If we could blow that up, Line 18. Says, "There's no bright line rule that says, okay, 6 percent is good or 7 percent is good, but I think as Mr. Strasma said looking in the 5 percent range and concluding that you have a rational basis for perhaps going to 7 percent in one district or 8 percent, and I'm just throwing numbers out, a rational basis is compliant with the Voting Rights Act. And underpopulating certain districts to the extent that you increase the minority proportion, another acceptable tool is [1086] reducing the Anglo voters who have been shown through analysis do not support minority candidates of choice. That's a very accepted redistricting tool that is something that I have been doing with many of my clients around the country. That's something that the Department of Justice looks at."

Do you remember getting that advice from Mr. Adelson?

A. I do. I didn't specifically but –

Q. It refreshes your memory?

A. Now that I have read it, yes.

Q. And again, ma'am, you followed that advice in the way that you voted relative to the maps. True?

A. I did. I felt he was a credible person since he worked at DOJ and was on the receiving end of the submission last time.

* * *

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Tuesday, November 29, 2011
1:35 p.m.

Location

Fiesta Resort – Fiesta Ballroom
2100 South Priest Drive
Tempe, Arizona 85282

Attending

Colleen C. Mathis, Chair
Jose M. Herrera, Vice Chair
Linda C. McNulty, Commissioner
Richard P. Stertz, Commissioner

Ray Bladine, Executive Director
Buck Forst, Information Technology Specialist
Kristina Gomez, Deputy Executive Director

Mary O'Grady, Legal Counsel
Joe Kanefield, Legal Counsel
Bruce Adelson, Legal Counsel

Excerpts of Transcript

* * *

[104] BRUCE ADELSON: Commissioner Stertz, in the first part of that – let me back up for a little bit.

[105] In looking at – in determining these districts, we look to determine the – whether or not minority voters are able and have been able to elect their candidates of choice.

In looking at the various districts in Arizona, my belief is that there are ten districts, benchmark districts, meaning precleared districts, where minority voters have demonstrated the ability to elect.

* * *

[107] In terms of the introduction to the legislative question, the question of ten benchmark districts has been a ongoing point of discussion. And I believe the document that you have today has the same assertion that we've made now that were operating under the assumption that there are ten benchmark districts and that our burden is to prove that we have the same number of equal or better quality.

* * *

[115] KENNETH STRASMA: We've been trying to keep the deviation well within plus or minus five percent. I believe it's two point something to three point something, so just over five percent of total range.

And so I would say if we can avoid underpopulating by more than three percent, that would still be within the acceptable population deviation range. And there would be an acceptable compelling reason for doing of, to underpopulate majority minority.

CHAIRPERSON MATHIS: Is that of the population as a whole or the minority population in that district?

KENNETH STRASMA: Population as a whole.

The deviation constraints are total population, not any racial category.

COMMISSIONER STERTZ: Madam Chair, Mr. Strasma, is that merely to gain a percentage?

KENNETH STRASMA: Beg your pardon?

COMMISSIONER STERTZ: Is that merely to gain a percentage of opportunity? Is it purely a numbers game?

KENNETH STRASMA: There are two reasons for that.

One is in order to strengthen the ability to elect [116] in that district.

If we have guidance that allows a certain percent of population deviation and the choice of some districts be over and some districts be under, and were able to strengthen the minority vote by underpopulating the minority, then that in other jurisdictions has been held to be acceptable.

The other reason for doing that is because of the disproportionate share of population growth that has been in Hispanic community in Arizona. It is likely that these districts that are currently underpopulated would be overpopulated by the end of the decade, if not by the next election.

So taking into account areas of population growth is another reason why the Commission might choose to underpopulate.

* * *

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Thursday, December 1, 2011
1:05 p.m.

Location

Fiesta Resort
2100 South Priest Drive
Tempe, Arizona 85282

Attending

Colleen C. Mathis, Chair
Linda C. McNulty, Commissioner
Richard P. Stertz, Commissioner

Ray Bladine, Executive Director
Kristina Gomez, Assistant Executive Director
Buck Forst, Information Technology Specialist
Stuart Robinson, Public Information Officer

Mary O'Grady, Legal Counsel
Joe Kanefield, Legal Counsel
Bruce Adelson, Legal Counsel

Excerpts of Transcript

* * *

[21] WILLIE DESMOND: Then the other one we have prepared for today is changes to Legislative District 4, the district that goes through southern Yuma and comes up through the western portion of Maricopa County, and also [22] includes the Tohono O'odham Nation.

* * *

WILLIE DESMOND: District 14, looking at it in the Tucson area, there wasn't any real obvious places to grab minority population, because it does border voting rights districts in Districts 2 and 3.

And then the area by Picture Rock, Marana and stuff, there wasn't any real good population to grab that [23] would improve it.

I'll turn on the block. This is shaded differently.

There was no real strong areas following in District 11 to pick up minority population.

So continuing along, I went up into Maricopa County, and found kind of the same thing.

It runs along District 19, which is one of our voting rights districts. And on the north side, District 13 does not have much to offer by way of minority population or strong support for the mine inspector's race.

So, really, we're left with the possibility of removing population is the only – only method.

Again, because in this area we didn't want to remove any of the reservation area, in order to keep that whole, that was not a very good option.

There is the town of Three Points here. We didn't want to split another boundary, so I left that.

And found the same thing in Maricopa.

What we're left with, really, is trying to improve it in Yuma, so that's where I proceeded.

District 4 did not gain any population. It really just shed some of its whiter areas.

In this case, since District 4 already started with a fairly strong voting age percentage, there wasn't [24] consideration to increase that.

What we were aiming to do was to improve the ability to elect.

So the consideration that kind of trumped the racial makeup of the area was the performance.

Again, I used mine inspector here, and probably looked at other races. We certainly want to verify it and make sure the changes are good, and put it in the report.

But you can see again the numbers are on the whole, let me – are how the Hispanic candidate performed in the mine inspector's race.

So by and large, these areas were very low performing. That's why they were removed.

District 4 started highly overpopulated, so it did have quite a lot of population to shed.

District 13, where the population was transferred to – started about 500 people under-populated, so with that population to gain, I guess.

We moved about 8,000 people. 8,622 people from District 4 to District 13. And by doing so, we were able to – District 4 went from HVAP of 53.65, up to 54.46. So it did improve there.

And also we were able to bring the mine inspector race from 51 percent up to 52 percent, so it gained about one percent.

[25] Curious, I'll turn on the streets here, so you can kind of see where these changes are.

So I used the one when – Palo Verde back up at Pacific.

Then on 26th Place, what we did is take it straight across at 24th Street and then down here at, think that's First Avenue, kind of around, following the census block.

One other thing that was affected by this is there are two fewer unsplit districts for census tracts and five fewer census block groups, so it did improve on our splits report, also.

* * *

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Thursday, December 8, 2011
11:13 a.m.

Location

Phoenix-Airport
Crowne Plaza Holiday Inn
4300 East Washington
Phoenix, Arizona 85034

Attending

Colleen C. Mathis, Chair
Jose M. Herrera, Vice Chair
Scott Day Freeman, Vice Chair
Linda C. McNulty, Commissioner

Ray Bladine, Executive Director
Kristina Gomez, Deputy Executive Director
Buck Forst, Information Technology Specialist

Kristin Windberg [sic], Legal Counsel
Bruce Adelson, Legal Counsel

Excerpts of Transcript

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[17] CHAIRPERSON MATHIS: Any other questions on this or comments?

This may be a question for legal counsel. I'm not sure. But the deviation from ideal population, what we've determined that to be, what is an acceptable range?

BRUCE ADELSON: Madam Chair, unfortunately, there is no black letter absolute this deviation is okay.

But the deviations are across the entire plan, across all 30 districts.

So, arguably, you could have deviation, I wouldn't recommend this, a 15 percent in one district, and two in another district. And the average is not going to be 15 percent across the plan.

So it's across the plan.

And in the various districts, of course, that I've looked at, and the various changes that are being suggested, I haven't seen any deviation that is hugely out of whack. But because there is no bright line, absolutely you must do the tasks. Just like many things, there's no absolute guarantee as far as liability in a court setting.

From a deviation – deviation from Justice's standpoint, Justice only views that as significant if you're violating the Voting Rights Act. So if you have a substantial deviation, or small deviation, and that results in retrogression, that's something that Justice cares about [18] that. But if you have an 8-percent deviation or a 9-percent deviation, without retrogression, that's not an issue for Justice.

That may be an issue from a liability standpoint for private individuals, but Justice focuses on discrimination as is detailed in the Voting Rights Act, That's what their primary concern would be.

CHAIRPERSON MATHIS: Thank you.

KRISTIN WINDTBERG: And I, Madam Chair, would add to that but I think there have been previous discussions with this Commission trying to keep the overall deviations close to the deviations that were in the benchmark.

So I would echo what Mr. Adelson is saying, that you need to keep this in mind as you're looking at all of the changes that you're making as to the amount of deviation district by district, but that one single district having a deviation of 6.2 is probably not going to be end all, be all. But I would keep it in mind as you're looking at all the changes you go through.

BRUCE ADELSON: Madam Chair, if I could add a point.

I agree with that. The Larios v. Cox, the federal court decision from 2004, that basically said that jurisdictions cannot assume that 10 percent deviation is safe harbor in. But the court did not establish 7.5 or [19] 8 percent as a new safe harbor.

I generally like to receive deviations in roughly the 5-percent range.

However, there have been jurisdictions that I've worked with in this redistricting cycle where the majority-minority districts deviation was higher than

that because we intentionally under-populated in order to comply with Section 5.

* * *

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Monday, December 12, 2011
9:49 a.m.

Location

Fiesta Inn Resort – Fiesta Ballroom
2100 South Priest Drive
Tempe, Arizona 85282

Attending

Colleen C. Mathis, Chair
Jose M. Herrera, Vice Chair
Scott Day Freeman, Vice Chair
Linda C. McNulty, Commissioner
Richard P. Stertz, Commissioner

Buck Forst, Information Technology Specialist
Kristina Gomez, Deputy Executive Director

Joe Kanefield, Legal Counsel
Kristin Windtberg, Legal Counsel

Excerpts of Transcript

* * *

[146] [WILLIE DESMOND] I guess seeing in the south, the next big – big change has been to Legislative District 2, which is another voting rights district.

The arm in Cochise County, as we all know, has been removed and added to District 1.

In order to balance the population, Green Valley has been added into congressional – or Legislative District 2.

District 10 remains the same.

District 9 sheds some population to District 3, but did not pick up any populations. It was a little overpopulated. Now it's probably a little underpopulated. That was just to balance between the two.

District 1, which is now all of Cochise County, all of the non-tribal portion of Graham County, and all of Greenlee County. Greenlee County was added in.

Changes were made to Legislative District 7, which is another one of our majority-minority districts. District 7 also picked up the areas of Show Low and Linden and the unincorporated, areas to the east of that, and gave up population here in Sun Valley and the unincorporated areas around that.

* * *

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Friday, December 16, 2011
4:08 p.m.

Location

Fiesta Resort – Fiesta I Ballroom
2100 South Priest Drive
Tempe, Arizona 85282

Attending

Colleen C. Mathis, Chair
Jose M. Herrera, Vice Chair
Scott Day Freeman, Vice Chair
Linda C. McNulty, Commissioner
Richard Stertz (via teleconference)

Ray Bladine, Executive Director
Buck Forst, Information Technology Specialist
Kristina Gomez, Deputy Executive Director
Stu Robinson, Public Information Officer

Mary O'Grady, Legal Counsel
Joe Kanefield, Legal Counsel
Bruce Adelson, Legal Counsel

Excerpts of Transcript

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[67] [WILLIE DESMOND] Also for today there's one more change report for the legislative. And that was something that Commissioner McNulty had asked me for this afternoon. That was just to try and balance some population of some of our non majority-minority districts that had either far too much pop – depending on what the legal team says,

too much population or too few, trying to bring down the deviation closer to zero.

* * *

[78] [BRUCE ADELSON] As far as the Guadalupe issue, my concern has been that District 26, the draft district, is arguably one of the weakest as far as several of the metrics in the draft map.

DOJ in Section 5 evaluation looks at many things.

They look at performance. They look at HVAP, HCVAP, total minority population, and they compare that with the benchmark.

The way District 26 now is in several categories District 26 is weaker than the weakest benchmark district in certain categories, not in all the categories.

And there are – because that doesn't match up well, my concern is that we should – my recommendation [79] respectfully is that the Commission should enhance the district to the extent that we can.

* * *

[124] MARY O'GRADY: Yeah, Madam Chair, commissioners, on the subject of deviations in the legislative map, the working map did have a – I think it made sense to make every effort, as this change does, to reduce the deviations that are in the map, other than the voting rights district.

We understand that they're low. We've made a record as to why they are low for the most part.

But in the other districts, to the extent there are deviations, you should try to reduce them and justify them. To the extent they aren't reduced, explain why they are there and so we have that record.

In no case, when we're done, should the deviations [125] exceed – I mean, under the federal law it's 10 percent.

And we suggest that you try and keep the range as minimal as possible.

Joe?

JOSEPH KANEFIELD: Madam Chair, the only thing I would add, and I think Mary hit on this, was that under the evolving case law on the subject of population deviation under the Equal Protection Clause for purposes of the legislative maps, the old rule used to be 10 percent was the safe harbor. Because of intervening precedent over the last decade, that's not necessarily the case.

There can be a deviation, but the Commission needs to explain why there has been a deviation. It's basically going to be judged on a reasonable basis, rational basis kind of standard by the court.

But they will – it would be good to justify those deviations, at least on the record, explain why they took place.

Voting Rights Act, adjusting districts to accommodate the Section 5 concerns of Voting Rights Act obviously would be one.

Such concern, keeping communities together, municipalities, that kind of thing.

So we would encourage you to put on the record the reasons for the deviations, when we get to that point, for [126] the final adoption.

* * *

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Monday, December 19, 2011
9:37 am,

Location

Fiesta Inn Resort
2100 South Priest Drive
Tempe, Arizona 85282

Attending

Colleen C. Mathis, Chair
Jose M. Herrera, Vice Chair
Scott Day Freeman, Vice Chair
Linda C. McNulty, Commissioner
Richard P. Stertz, Commissioner

Ray Bladine, Executive Director
Kristina Gomez, Deputy Executive Director
Buck Forst, Information Technology Specialist

Joe Kanefield, Legal Counsel
Mary O'Grady, Legal Counsel

Excerpts of Transcript

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[10] JOSEPH KANEFIELD: Bruce is not available today. He is in Florida. But we have corresponding copies issued, as Mary mentioned, and he has recommended, to the extent we [11] can strengthen LD 8, that would be very helpful in terms of the voting rights issue, especially given the numbers of 26 and 8.

* * *

[12] MARY O'GRADY: Well in terms of the geography, Commissioners, 6 measures – 8 is where 23 was, geographically. So they're in the same vicinity. So to some extent, this will help us show Justice that we did the best we could with the voters who were in what we argued was previously a voting rights district in 23, because before these people, these voters, under our prior configuration, weren't an ability to elect district.

Now at least shows argument that we've done as best as we can to maintain the same level of support in 23 that was in old 23, with the way we've configured 8.

* * *

[42] VICE-CHAIR HERRERA: Would you entertain a motion to send any of the changes to LD 8 to strengthen the majority-minority strength to get it analyzed?

CHAIRPERSON MATHIS: Yes, I would, based on the discussion Friday. And I would encourage anybody who didn't see Friday's meeting to be sure to pull that up online, to see the discussion regarding this potential for an 11th majority-minority district.

And if I'm phrasing that incorrectly, because it's actually called something else technically, I apologize. But you should watch that, and it's a discussion with Mr. Adelson regarding this.

And I do think it's worth considering for further analysis if it strengthens the overall plan for pre-clearance.

VICE-CHAIR HERRERA: Madam Chair, then I make that motion.

* * *

[50] CHAIRPERSON MATHIS: Any other discussion?

(No oral response.)

CHAIRPERSON MATHIS: All in favor?

VICE-CHAIR HERRERA: A strong, yes.

COMMISSIONER McNULTY: Aye.

CHAIRPERSON MATHIS: Aye.

CHAIRPERSON MATHIS: Any opposed?

COMMISSIONER STERTZ: No.

VICE-CHAIR FREEMAN: Nay.

[51] CHAIRPERSON MATHIS: Okay. The motion carries three, two. So we'll he sending this legislative working map draft change report, the malty LD 8, Version 2, to Dr. King for additional analysis.

* * *

[98] COMMISSIONER STERTZ: While Mr. Desmond runs the change report, I appreciate this work in progress, because it's also showing anybody

that's out there that we are looking at this thing at this level.

On various edges on certain districts on the map, I know some of these have to do with census blocks where we have small dips and notches.

One of the things we talked about a week ago to try to get to major – get away from local roads, local streets, and go to arterials and collectors, without going through all of the different lines on all of the maps, has that been an attempt by Strategic to do that?

For example, I noticed in the city between Districts 9 and 10, you moved off of Helen Street and moved to Speedway, for example, where it went from a local street to the south to Speedway Boulevard, which is an arterial.

[99] CHAIRPERSON MATHIS: That's a good thing, isn't it?

COMMISSIONER STERTZ: It is.

COMMISSIONER McNULTY: That was in the population balancing that we had just looked at.

* * *

[108] CHAIRPERSON MATHIS: So I'd entertain a motion to incorporate these changes as just described into the working map.

COMMISSIONER McNULTY: I move that we incorporate the swap that Mr. Stertz put forward,

and the changes on my population balance proposal, except for the movement of Camp Verde to District 6, which we'll hold off on until we discuss those districts. And with that exception, incorporate these into the working draft and request that Dr. King analyze District 2 as revised.

CHAIRPERSON MATHIS: There is a second?

COMMISSIONER STERTZ: I'll second.

[109] CHAIRPERSON MATHIS: Any discussion?

I didn't realize Mr. Herrera wasn't here.

I don't know if he needs to be for that.

I mean, I know we can move forward without him, but I would like – there he is.

Mr. Herrera, I didn't know you were out of the room when I said I'd entertain a motion.

COMMISSIONER McNULTY: We just moved to replace you.

VICE-CHAIR HERRERA: Sorry.

CHAIRPERSON MATHIS: To bring you up to speed, we just had a motion that was seconded, a motion made by Ms. McNulty, seconded by Mr. Stertz, to essentially put the changes we just talked about, Rita Road, the Rita Ranch neighborhood swap we just talked about the adjustments, for population balance

between 9 and 10, that change there, that was in, that Mr. Desmond has already done a change report on.

I'm trying to think of other parts of that motion.

Essentially, to put those into the working map as described, and then hold off on the Camp Verde population balance change until we deal with the districts up there.

Is there anything else I'm missing from that motion?

COMMISSIONER McNULTY: I don't think so, Madam [110] Chair. I think that covers it.

CHAIRPERSON MATHIS: Okay. And we are now at the any discussion standpoint, if anybody has comments on that.

(No oral response.)

CHAIRPERSON MATHIS: Okay. Hearing none, all in favor?

COMMISSIONER STERTZ: Aye.

COMMISSIONER McNULTY: Aye.

VICE-CHAIR FREEMAN: Aye.

CHAIRPERSON MATHIS: Any opposed?

VICE-CHAIR HERRERA: Abstaining.

CHAIRPERSON MATHIS: So we have four ayes and one abstention, Mr. Herrera.

* * *

UNITED STATES DEPARTMENT OF JUSTICE SUBMISSION
UNDER SECTION 5 OF VOTING RIGHTS ACT

6	18+ Hispanic	20,198	12.5%	21,324	12.6%	1,126	0.0%
6	18+ NH Native American	8,752	5.4%	9,207	5.4%	455	0.0%
6	18+ African-American	1,605	1.0%	1,639	1.0%	34	0.0%
6	18+ total minority	35,183	21.8%	37,030	21.8%	1,847	0.0%
6	Hispanic CVAP	11,420	8.1%	11,868	8.0%	448	-0.1%
6	Hispanic Registration	7,293	6.6%	7,639	6.6%	346	0.0%
6	2004 Prop 200 Yes	42,999	52.0%	45,241	52.4%	2,242	0.4%
6	2004 President Dem	41,622	47.4%	42,867	46.8%	1,245	-0.6%
6	2006 Sec of St Dem	27,396	42.8%	28,243	42.2%	850	-0.6%
6	2008 President Dem	40,723	46.1%	42,093	45.5%	1,370	-0.6%
6	2010 Mine Dem	26,619	41.7%	27,540	41.1%	921	-0.6%

UNITED STATES DEPARTMENT OF JUSTICE SUBMISSION
UNDER SECTION 5 OF VOTING RIGHTS ACT

STATE OF ARIZONA

LEGISLATIVE REDISTRICTING PLAN

Submitted By

Arizona Independent Redistricting Commission

February 28, 2012

Notebook 3 of 5

CONTENTS:

EXHIBITS 5A thru 5B

Change Report: Pop_balance_121611

OLD MAP: LEG-WORKING_MAP-120911-BLOCK_EQUIVALENCY
NEW MAP: LEG_DRAFT_CHANGE-POP_BALANCE_121611-BLOCK_EQUIVALENCY
DISTRICTS CHAN 1, 6, 7, 9, 10 & 14

POPULATION – Pop balance_121611

DIST	CATEGORY	OLD DISTRICT		NEW DISTRICT		CHANGE	
		#	%	#	%	#	%
1	Deviation from Ideal Population	11,766	5.5%	5,384	2.5%	-6,382	-3.0%
1	NH White	137,540	61.2%	132,916	60.8%	-4,624	0.3%
1	Hispanic	68,599	30.5%	67,523	30.9%	-1,076	0.4%
1	NH Native-American	1,921	0.9%	1,885	0.9%	-36	0.0%
1	NH African-American	7,285	3.2%	7,034	3.2%	-251	0.0%
1	Total minority	87,294	38.8%	85,536	39.2%	-1,758	0.3%
1	18+ NH White	110,198	65.3%	106,752	65.0%	-3,446	-0.3%
1	18+ Hispanic	45,087	26.7%	44,458	27.1%	-629	0.4%
1	18+ NH Native American	1,532	0.9%	1,508	0.9%	-24	0.0%
1	18+ African-American	5,613	3.3%	5,431	3.3%	-182	0.0%
1	18+ total minority	58,640	34.7%	57,553	35.0%	-1,087	0.3%
1	Hispanic CVAP	33,007	22.4%	32,341	22.7%	-666	0.3%
1	Hispanic Registration	21,552	17.2%	21,200	17.4%	-352	0.2%
1	2004 Prop 200 Yes	39,086	57.3%	37,931	57.4%	-1,155	0.1%
1	2004 President Dem	26,655	37.4%	25,698	37.2%	-957	-0.2%
1	2006 Sec of St. Dem	20,963	38.9%	20,159	38.8%	-804	-0.1%
1	2008 President Dem	31,496	37.3%	30,141	37.0%	-1,355	-0.3%
1	2010 Mine Dem	24,888	37.4%	23,826	37.2%	-1,062	-0.2%

6	Deviation from Ideal Population	-9,908	-4.7%	1,072	0.5%	10,980	5.2%
6	NH White	150,957	74.3%	159,090	74.3%	8,133	0.0%
6	Hispanic	31,382	15.4%	33,171	15.5%	1,789	0.0%
6	NH Native-American	12,404	6.1%	13,050	6.1%	646	0.0%
6	NH African-American	1,958	1.0%	2,004	0.9%	46	0.0%
6	Total minority	52,202	25.7%	55,050	25.7%	2,848	0.0%
6	18+ NH White	126,167	78.2%	132,859	78.2%	6,692	0.0%
6	18+ Hispanic	20,198	12.5%	21,324	12.6%	1,126	0.0%
6	18+ NH Native American	8,752	5.4%	9,207	5.4%	455	0.0%
6	18+ African-American	1,605	1.0%	1,639	1.0%	34	0.0%
6	18+ total minority	35,183	21.8%	37,030	21.8%	1,847	0.0%
6	Hispanic CVAP	11,420	8.1%	11,868	8.0%	448	-0.1%
6	Hispanic Registration	7,293	6.6%	7,639	6.6%	346	0.0%
6	2004 Prop 200 Yes	42,999	52.0%	45,241	52.4%	2,242	0.4%
6	2004 President Dem	41,622	47.4%	42,867	46.8%	1,245	-0.6%
6	2006 Sec of St Dem	27,396	42.8%	28,243	42.2%	850	-0.6%

7	Deviation from Ideal Population	-10,023	-4.7%	-10,023	-4.7%	0	0.0%
7	NH White	50,372	24.8%	50,372	24.8%	0	0.0%
7	Hispanic	13,882	6.8%	13,882	6.8%	0	0.0%
7	NH Native-American	133,841	65.9%	133,841	65.9%	0	0.0%
7	NH African-American	914	0.5%	914	0.5%	0	0.0%
7	Total minority	152,672	75.2%	152,672	75.2%	0	0.0%
7	18+ NH White	40,012	28.7%	40,012	28.7%	0	0.0%
7	18+ Hispanic	8,547	6.1%	8,547	6.1%	0	0.0%
7	18+ NH Native American	87,853	63.1%	87,853	63.1%	0	0.0%
7	18+ African-American	778	0.6%	778	0.6%	0	0.0%
7	18+ total minority	99,252	71.3%	99,252	71.3%	0	0.0%
7	Hispanic CVAP	6,450	4.7%	6,450	4.7%	0	0.0%
7	Hispanic Registration	4,745	4.1%	4,745	4.1%	0	0.0%
7	2004 Prop 200 Yes	27,269	53.6%	27,269	53.6%	0	0.0%
7	2004 President Dem	35,348	60.2%	35,348	60.2%	0	0.0%
7	2006 Sec of St Dem	25,582	61.4%	25,582	61.4%	0	0.0%
7	2008 President Dem	39,170	60.5%	39,170	60.5%	0	0.0%
7	2010 Mine Dem	32,166	63.0%	32,166	63.0%	0	0.0%

9	Deviation from Ideal Population	-10,347	-4.9%	150	0.1%	10,497	4.9%
9	NH White	139,334	68.7%	146,022	68.5%	6,688	0.2%
9	Hispanic	44,169	21.8%	46,661	21.9%	2,492	0.1%
9	NH Native-American	1,945	1.0%	2,065	1.0%	120	0.0%
9	NH African-American	5,339	2.6%	5,914	2.8%	575	0.1%
9	Total minority	63,386	31.3%	67,196	31.5%	3,810	0.2%
9	18+ NH White	119,682	73.2%	125,632	73.0%	5,950	-0.2%
9	18+ Hispanic	29,806	18.2%	31,504	18.3%	1,698	0.1%
9	18+ NH Native American	1,455	0.9%	1,550	0.9%	95	0.0%
9	18+ African-American	3,931	2.4%	4,343	2.5%	412	0.1%
9	18+ total minority	43,836	26.8%	46,482	27.0%	2,646	0.2%
9	Hispanic CVAP	22,051	13.9%	23,354	14.1%	1,303	0.2%
9	Hispanic Registration	10,309	9.5%	10,801	9.5%	492	0.0%
9	2004 Prop 200 Yes	42,241	46.7%	44,056	46.5%	1,815	-0.2%
9	2004 President Dem	50,341	53.1%	53,135	53.5%	2,794	0.4%
9	2006 Sec of St Dem	34,158	49.6%	36,088	50.0%	1,930	0.4%
9	2008 President Dem	51,535	54.1%	54,115	54.5%	2,580	0.4%
9	2010 Mine Dem	36,163	50.9%	37,977	51.4%	1,814	0.4%

10	Deviation from Ideal Population	2,121	1.0%	-1,994	-0.9%	-4,115	-1.9%
10	NH White	140,932	65.5%	138,868	65.8%	-2,064	0.3%
10	Hispanic	50,544	23.5%	49,128	23.3%	-1,416	-0.2%
10	NH Native-American	1,891	0.9%	1,807	0.9%	-84	0.0%
10	NH African-American	9,880	4.6%	9,556	4.5%	-324	-0.1%
10	Total minority	74,257	34.5%	72,205	34.2%	-2,052	-0.3%
10	18+ NH White	119,917	70.2%	117,413	70.5%	-2,504	0.2%
10	18+ Hispanic	33,556	19.7%	32,487	19.5%	-1,069	-0.2%
10	18+ NH Native American	1,410	0.8%	1,339	0.8%	-71	0.0%
10	18+ African-American	7,425	4.3%	7,195	4.3%	-230	0.0%
10	18+ total minority	50,785	29.8%	49,226	29.5%	-1,559	-0.2%
10	Hispanic CVAP	26,794	16.0%	26,157	15.9%	-637	-0.1%
10	Hispanic Registration	13,088	11.6%	12,948	11.5%	-140	0.0%
10	2004 Prop 200 Yes	44,835	48.3%	44,175	48.7%	-660	0.4%
10	2004 President Dem	50,600	51.9%	48,763	51.2%	-1,837	-0.7%
10	2006 Sec of St Dem	35,060	49.4%	33,934	48.8%	-1,126	-0.6%
10	2008 President Dem	51,888	52.6%	50,663	51.9%	-1,225	-0.7%
10	2010 Mine Dem	36,855	50.2%	36,103	49.5%	-752	-0.7%

14	Deviation from Ideal Population	7,382	3.5%	-3,598	-1.7%	-10,980	-5.2%
14	NH White	175,796	79.7%	167,663	80.0%	-8,133	0.3%
14	Hispanic	32,101	14.6%	30,312	14.5%	-1,789	-0.1%
14	NH Native-American	2,494	1.1%	1,848	0.9%	-646	-0.2%
14	NH African-American	3,219	1.5%	3,173	1.5%	-46	0.1%
14	Total minority	44,654	20.3%	41,806	20.0%	-2,848	-0.3%
14	18+ NH White	143,253	83.5%	136,561	83.7%	-6,692	0.3%
14	18+ Hispanic	19,814	11.5%	18,688	11.5%	-1,126	-0.1%
14	18+ NH Native American	1,865	1.1%	1,410	0.9%	-455	-0.2%
14	18+ African-American	2,186	1.3%	2,152	1.3%	-34	0.0%
14	18+ total minority	28,367	16.5%	26,520	16.3%	-1,847	-0.3%
14	Hispanic CVAP	10,475	7.2%	10,027	7.3%	-448	0.1%
14	Hispanic Registration	7,942	6.5%	7,596	6.5%	-346	0.0%
14	2004 Prop 200 Yes	42,248	59.4%	40,006	59.3%	-2,242	-0.1%
14	2004 President Dem	25,881	34.7%	24,636	34.7%	-1,245	0.1%
14	2006 Sec of St Dem	18,403	30.8%	17,553	30.9%	-850	0.1%
14	2008 President Dem	32,125	34.4%	30,755	34.5%	-1,370	0.1%
14	2010 Mine Dem	21,961	30.5%	21,040	30.6%	-921	0.1%

No. 14-232

IN THE

Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT OF ARIZONA

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

This is the second of two cases arising from the Arizona Independent Redistricting Commission's (IRC) redrawing Arizona's congressional and state house and senate districts. This Court has already noted jurisdiction reaching the merits of the first case. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, No. 13-1314 (Order of October 2, 2014).

Arizona State Legislature asks whether it is constitutional under the Elections Clause to divest Arizona's state legislature of any role apportioning congressional districts and to vest redistricting in an independent commission not accountable to the legislature.

This case asks whether the IRC's reapportionment of Arizona's state legislature is constitutional when the IRC drew legislative districts that violate this Court's one-person, one-vote principle in *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), and *Roman v. Sincock*, 377 U.S. 695, 710 (1964). The IRC was capable of creating legislative districts with equal population, as it did when it created congressional districts with no population deviation.[1] Yet, when it came to state legislative districts, the IRC intentionally and systematically over-populated some Republican districts and under-populated Democrat

1. *See* IRC website, 2012 congressional district population data table at: <http://azredistricting.org/Maps/Final-Maps/Congressional/Reports/Final%20Congressional%20Districts%20-%20Population%20Data%20Table.pdf> (last visited November 29, 2014); *see also id.*, 2001 congressional district population data table at: <http://azredistricting.org/2001/Final/congfinal.pdf> (last visited November 29, 2014).

districts. App. 209a. The effect of the IRC's plan was to inflate the influence of Democrat voters and dilute the influence of Republican voters.

The district court found the IRC did this for partisan advantage and because the IRC hoped the Justice Department would more likely preclear this plan under the Voting Rights Act. App. 36a, 107a.

Proponents of the measure creating the IRC claimed divesting Arizona's legislature from the redistricting process and vesting sole reapportionment authority in the IRC would remove partisan interests from the redistricting process. *See* Op. Br. of *Ariz. State Legislature*, pp. 2-4 and authorities cited therein.

This case demonstrates the exact opposite occurred. By delegating redistricting to the IRC—a five-member body without any political accountability—Arizona's legislative districts were intentionally drawn to achieve partisan advantage for the Democrat party. Out of thirty districts, "the 18 with population deviation greater than ±2% from ideal population correlate *perfectly* with Democrat Party advantage." App. 108a (emphasis added). The total population deviation (a measure of how unequal these district are) is close to 9%. This is an almost three times greater deviation than Arizona's prior legislative districts.[2]

---

2. *See* IRC website, adopted legislative redistricting plan of April 12, 2004 showing total deviation of 3.12%, at: <http://azredistricting.org/2001/2004newlegtests/batch7/April%2012%20Adopted%20stats.pdf> (last visited Nov. 29, 2014).

The IRC's unequal legislative districts deny equal weight to more than 70,000 Arizona citizens' votes. App. 112a-113a; *see also* App. 209a; Jurisdictional Statement, pp. 8-10. As the legislative map and charts in Judge Wake's dissent demonstrate, the IRC adopted an unequally-apportioned scheme to redistrict Arizona's legislature for partisan benefit.

The IRC does not dispute the almost 9% population deviation in these unequal districts. Instead, it responds by claiming this is a "minor" or "insignificant" deviation from the one-person, one-vote standard the IRC was required to make to obtain Justice Department preclearance. The IRC asks this Court to uphold its intentionally unequal legislative districts even though this Court declared the formula upon which preclearance is triggered to be unconstitutional. *See Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

The problem is that, even if true, and even if §5 of the Voting Rights Act were still enforceable, obtaining Justice Department preclearance does not justify violating the one-person, one-vote constitutional mandate. *See Miller v. Johnson*, 515 U.S. 900, 927 (1995). The Voting Rights Act does not justify drawing systemically-unequal districts as the IRC did. As Judge Wake noted, even if one once believed obtaining Justice Department preclearance was a legitimate reason to violate the one-person, one-vote principle it no longer justified unequal districts after *Shelby County*. App. 124a-128a.

Finally, the IRC asks this Court to uphold its unequal legislative districts until the next reapportionment almost a decade from now. Doing so means more than 70,000

Arizona citizens are denied an equally-weighted vote for their state representative and state senator in *every* election over the next decade. If the one-person, one-vote principle means anything, it means we can do better than what the IRC did. It means the IRC's unequal legislative districts, established for the purpose of achieving, at least in part, a partisan advantage, are not constitutional and must be redrawn to conform to the one-person, one-vote principle.

The IRC's reapportionment systematically under-populated Arizona's majority-minority districts. The ten most under-populated districts also have the highest minority percentages. The IRC admits that this was intentional. But neither racial, ethnic, nor partisan motivations justify the IRC's unequal districts.

Even if the IRC thought systematic inequality was necessary to win the Justice Department's favor, this does not change the fundamental principle that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Reynolds*, 377 U.S. at 568. And, the IRC's misguided effort to obtain preclearance by under-populating minority districts unquestionably implicates racial and ethnic concerns and, thereby, raises "serious constitutional questions."[3] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006); *see also* App. 31a–34a.

3. *See Abrams v. Johnson*, 521 U.S. 74, 91 (1997).

I. Believing the Justice Department would more likely preclear its redistricting scheme does not justify unequal legislative districts that violate the Equal Protection Clause's guarantee of one-person, one-vote.

The IRC defends its unequal districts by arguing §5 required the IRC to draw these unequal districts. Mot. to Affirm, pp. 21-22. This is wrong for three reasons. **First,** Congress cannot compel by statute a state to violate the Fourteenth Amendment guarantee of Equal Protection. Thus, §5, even if it applies, does not compel unequal districts. **Second,** §5 is no longer a justification because this Court declared the coverage formula that brought Arizona within §5 unconstitutional. *Shelby County*, 133 S.Ct. at 2631. Consequently the IRC's desire to comply with §5 is not a legitimate reason to violate the one-person, one-vote principle. **Third**, preclearance did not require the IRC to draw unequal districts. *See* Jurisdictional Statement, p. 33-36, especially as to District 8.

The IRC says *Shelby County* is not relevant because *Shelby County* was decided after it finished redistricting Arizona's state legislative districts. Mot. to Affirm, pp. 24-27. The IRC argues *Shelby County* does not retroactively negate its supposed reliance on §5. *But see Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

The IRC fails to appreciate that *Shelby County* changed Arizona's relationship with the federal government. After *Shelby County*, Arizona was no longer subjected to §5's intrusive preclearance regime. This is precisely the point Judge Wake makes in his dissent. App. 122a-128a. The Voting Rights Act was created to address an "extraordinary problem." *Shelby County*, 133 S.Ct. at 2618; *see also McCain v. Lybrand*, 465 U.S. 236, 244 (1984) ("The 'preclearance' requirement mandated by §5 of the Act is perhaps the most stringent of these remedies, and certainly the most extraordinary."); *United States v. Bd. of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 141 (1977) ("This so-called 'preclearance' requirement is one of the most extraordinary remedial provisions in an Act known for its broad remedies.") (Powell, J., concurring).

Section 5's preclearance requirement was "a drastic departure from basic principles of federalism," and the now-unconstitutional §4 was an "equally dramatic departure from the principle that all States enjoy equal sovereignty." *Shelby County*, 133 S.Ct. at 2618. These legislative remedies were implemented under "exceptional conditions" equal to the "entrenched racial discrimination" the Voting Rights Act was designed to combat. *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)). Thus, the Voting Rights Act's "departures" from federalism and state sovereignty were "justified" only when necessary to break down invidious racial barriers to minority voting. *Id.* at 2625.

Sections 4 and 5 are inextricably intertwined. Section 4's formula was "the means of linking the exercise of the unprecedented authority with the problem that warranted it." *Id.*; *see also Bd. of Comm'rs*, 435 U.S. at 141 (Powell,

J., concurring) ("Section 5 provides that whenever a State or political subdivision, designated pursuant to §4, seeks to change a voting practice, it must obtain clearance for that change from either the United States District Court for the District of Columbia or the Attorney General of the United States.").

It is, thus, richly ironic the IRC invokes concepts of state sovereignty and federalism in defense of its unequal reapportionment scheme. Arizona suborning its internal redistricting process to §5 of the Voting Rights Act is *inimical* to federalism concerns. As the decisions of this Court note, §5 of the Voting Rights Act infringes the sovereignty of those states to which it applies. Such an intrusion can only be countenanced on the basis of invidious discrimination of the type once identified by §4's coverage formula. Because present conditions no longer justify such an intrusion, the district court was wrong to uphold the IRC's unequal reapportionment on this basis.

As noted in our opening brief, the IRC manipulated the population in districts 8, 24, and 26 for the supposed purpose of obtaining §5 preclearance. But unequally populating these districts was not "reasonably necessary" to comply with §5 "under a constitutional reading and application" of the Voting Rights Act. Jurisdictional Statement, pp. 31-41. Even if done to comply with how the IRC *thought* the Justice Department would apply the Voting Rights Act, the reapportionment "still must 'consist with the letter and spirit of the constitution.'" *Miller*, 515 U.S. at 927 (quoting *Katzenbach*, 383 U.S. at 326).

Here, the number of citizen voting-age Hispanics in districts 8, 24, and 26 were such that the IRC's claim that

these districts were so-called ability-to-elect districts is simply not credible. *See* Jurisdictional Statement, pp. 35-36. Nothing in the record supports the IRC's contention that systematic population disparities were "reasonably necessary" to achieve §5 preclearance.

The IRC claims it would have been "forced to choose between compromising its other goals or risking non-compliance with federal law, all in service of avoiding 'insignificant population variations.'" Mot. to Affirm, p. 30 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973)).

This is a false choice. The IRC had alternative districting plans that avoided any retrogression and did so with equally (or very close to equally) populated districts. These alternative plans also satisfied traditional race-neutral redistricting criteria such as respecting established geographic boundaries.

II. The unequal districts were not the result of traditional, race-neutral districting criteria.

We agree the Equal Protection Clause affords some degree of minor deviation from strict mathematical equality when necessary to accommodate traditional race-neutral redistricting criteria. States may draw districts with minor population disparities so long as those districts will not "deprive any person of fair and effective representation in his state legislature." *Gaffney*, 412 U.S. at 749.

But that is not what happened here.

This Court described the following "unchallenged premise" in redistricting cases: "[P]opulation variances

in legislative districts are tolerated only if they 'are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.'" *Perry*, 548 U.S. at 421.[4] This Court's jurisprudence has been quite clear: When using racial and ethnic criteria to draw legislative districts, the state cannot violate traditional race-neutral redistricting criteria without triggering strict scrutiny.

Justice O'Connor explained:

> *[S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy*, States may intentionally create majority minority districts, and may otherwise take race into consideration without coming under strict scrutiny.
>
> *Bush v. Vera*, 517 U.S. 952, 993 (1996) (O'Connor, J., concurring) (emphasis added).

The IRC-drawn districts were not unequally drawn to accommodate traditional redistricting criteria such as compactness and geographic boundaries. Rather, these unequal districts were the intended result of a desire to achieve a race-based, partisan outcome.

---

4. Citing *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)).

III. The Equal Protection Clause prohibits deviations from population equality to accomplish an illegitimate objective.

The district court offered only two justifications for the IRC's unequal districts: partisan advantage and a perceived need to gain Justice Department preclearance. We show above (and in the Jurisdictional Statement) that it was not necessary, as a matter of fact or law, to have unequal districts to obtain Justice Department preclearance. This is so even if preclearance under §5 was still a valid consideration after *Shelby County*.

We are left with the IRC's desire to achieve partisan advantage as the only remaining justification explaining why it unequally apportioned Arizona's legislative districts. The district court correctly assumed partisan advantage was not a legitimate objective. App. 6a, 62a, 63a n.10, 79a.

We recognize

> In *Davis v. Bandemer*, the Court held that an equal protection challenge to a political gerrymander presents a justiciable case or controversy, but there was disagreement over what substantive standard to apply. That disagreement persists. A plurality of the Court in *Vieth*[5] would have held such challenges to be nonjusticiable political questions, but a majority declined to do so.

Perry, 548 U.S. at 413-14 (citations omitted).

5. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004).

In *Perry*, this Court continued, holding, "[w]e do not revisit the justiciability holding but do proceed to examine whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution." *Id.* at 414.

The IRC claims this case is like *Vieth*. The IRC is wrong. There are significant differences between this case and cases like *Vieth* in which this Court has suggested a healthy skepticism for leaping into the "political thicket."

First, after *Shelby County*, partisan advantage is the IRC's *only* possible justification for adopting unequal legislative districts. The district court did not find that any traditional districting considerations—such as geographic boundaries and compactness—required the IRC's unequal districts.

Second, the IRC intentionally drew unequal districts with a population deviation of close to 9%. This is not like *Vieth*, involving a challenge to districts with *zero-population deviation*. Thus, in *Vieth*, voters went to the polling booths with equally weighted votes. That did not happen in Arizona, where the IRC's redistricting scheme allows voters in Hispanic-plurality districts to wield significantly more political influence than those in non-Hispanic-White-plurality districts. The IRC could have—even while seeking partisan objectives—drawn equally-populated districts. After all, the IRC drew Arizona's congressional districts with zero-population deviation.

This case does *not* present the question of whether partisan gerrymandered districts of *equal population*

are justiciable and constitutional. Rather, this case asks whether it is constitutional to create *unequal districts* for the purpose of achieving a partisan advantage and not to satisfy traditional, race-neutral districting objectives.

The *Larios* opinion, which this Court summarily affirmed, noted the important difference between political gerrymandering (when districts are otherwise equal) and drawing unequal districts that violate the one-person, one-vote. *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1351-52 (N.D. Ga. 2004).

Individual Arizona voters who have been unequally treated are bringing this challenge under the one-person, one-vote principle and ask this Court to vindicate their right to equal protection. This case is *not* a challenge by a *political party or group* claiming the IRC's redistricting scheme makes it more difficult to elect representatives of its choice in certain districts.

Finally, in *Perry*, Justice Kennedy noted the Constitution "leaves with the States primary responsibility for apportionment of their federal congressional... districts." 548 U.S. at 414 (quoting *Growe v. Emison*, 507 U.S. 25, 34 (1993)). But as the *Arizona State Legislature* challenge demonstrates, Arizona's legislative districts were *not* drawn by the Arizona state legislature. They were drawn by the IRC, a five-member commission independent of the legislature. The constitutional deference traditionally accorded a state legislature is not applicable where (as here) the redistricting was not done by the state legislature.

CONCLUSION

We ask this court to note jurisdiction, to reverse the district court, and to remand this matter instructing that Arizona's state legislative districts be reapportioned consistent with the one-person, one-vote standard. Alternatively, we ask this Court to stay this appeal pending its decision in *Arizona State Legislature* and, in light of that decision, vacate the decision of the district court and remand this case to the district court to reconsider its decision in light of this Court's decision in *Arizona State Legislature.*

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No. 14-232

IN THE

Supreme Court of the United States

SUPREME COURT, U.S.
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WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT OF ARIZONA

JOINT APPENDIX

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PROBABLE JURISDICTION NOTED JUNE 30, 2015

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Date Filed	#	Docket Text
		* * *
11/16/2012	55	* AMENDED COMPLAINT against All Defendants filed by All Plaintiffs. (Cantelme, David) *Modified to correct text on 12/3/2012* (REW). (Entered: 11/16/2012)
		* * *
12/03/2012	64	*Secretary of State Ken Bennett's* ANSWER to 55 Amended Complaint by Ken Bennett. (Forney, Michele) (Entered: 12/03/2012)
12/03/2012	65	* ANSWER to Amended Complaint re: 55 *Second Amended* by Arizona Independent Redistricting Commission, Scott D Freeman, Jose M Herrera, Colleen Mathis, Linda C McNulty, Richard Stertz. (Molinar, Jeffrey) *Modified to add document number/link on 12/4/2012* (REW).

Appendix A

Modified to correct event type on 12/4/2012 (TLJ). (Entered: 12/03/2012)

* * *

04/29/2014	230	CLERK'S JUDGMENT - Pursuant to the Court's Order filed April 29, 2014, judgment is entered in favor of defendant and against plaintiff. Plaintiff to take nothing, and complaint and action are terminated (ALS) (Entered: 04/29/2014)

* * * *

APPENDIX B — SUPPLEMENTAL EXPERT REPORT OF DR. GARY KING AND BENJAMIN SCHNEER, DATED FEBRUARY 26, 2012

Candidates of Choice Supplement to: "An Analysis of the Arizona Independent Redistricting Commission Legislative District Map"*

Gary King† Benjamin Schneer‡

February 26, 2012

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* A web appendix to this report can be found at j.mp/az-doj.

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Appendix B

TABLES INTENTIONALLY OMITTED

Appendix B

1 Introduction

This supplement to our report on the Arizona Independent Redistricting Commission Legislative District Map discusses the candidates of choice in the benchmark legislative districts, as well as in several other legislative districts of interest. A number of documents submitted in support of the Commission's legislative district map make reference to the "candidate of choice" in a district. Here we show how we use ecological inference in an effort to determine the identities of the candidates of choice, with methodological details of the estimation procedure given in the main report. While the evidence indicates that in many cases the minority community in a district prefers a minority candidate, exceptions to this pattern often exist. An added complication is determining the candidate of choice in elections where no minority candidates are on the ballot.

Here, we analyze five state-wide races: US President 2004, Secretary of State 2006, US President 2008, Secretary of State 2010, and State Mine Inspector 2010. In four of these five races, there is a candidate who belongs to a racial minority group. The exception is the election for US President in 2004, where Democrat John Kerry faced Republican George W. Bush, neither of whom belonged to an ethnic minority group.[1] In the Arizona Secretary of State 2006 election, Democrat Israel Torres, who is Hispanic, faced Republican Jan Brewer, who does not

1. For this election and the ones that follow we do not focus on the race of third party candidates, however we do account for their vote shares in our estimation procedure.

belong to a minority group. In the US President 2008 election, Democrat Barack Obama, an African American, faced Republican John McCain, who does not belong to a minority group. In the Secretary of State 2010 election, Democrat Chris Deschene, a Native American, faced Republican Ken Bennet, who does not belong to a minority group. Finally, in the Arizona State Mine Inspector 2010 election, Democrat Manuel Cruz, who is Hispanic, faced Joe Hart, who does not belong to a minority group.

Where possible, we also include results from the Arizona State Senate 2008 election, Arizona State Senate 2010 election, and other significant local elections. In these races, the candidates vary by legislative district. In cases where an election was uncontested—a scenario that occurs relatively frequently in Arizona State Senate elections—we do not attempt to estimate the level of support among the district's minority groups because voters were given no choice.

Rather than offer any sweeping conclusions about a typical candidate of choice in the benchmark Legislative Districts, we hope that the analysis presented in this supplement can serve as a reference point for questions that might arise when examining other submitted documents.

Appendix B

2 Candidates of Choice in Benchmark Legislative Districts

This section presents a district by district analysis of candidates of choice in Arizona. The supporting tables for each district are found in the Appendix to this document.

2.1 LD 2

Native American voters, who comprise the primary minority group in benchmark LD 2, strongly preferred the Democratic candidates across all five statewide races. In fact, we estimate that in each of the statewide races the vote share for the Democratic candidate was above 75%. In the Secretary of State 2010 election, which included a Democratic candidate of Native American descent, we estimate that Native American voters voted at a rate of 92% for the Democratic candidate.

In terms of local congressional elections in benchmark LD 2, we estimate that Native American voters also strongly preferred the Democratic candidate for State Senator 2008. This election occurred between two candidates of Native American descent: Native American Democrat Albert Hale and Native American Republican Royce Jenkins. In 2010, the State Senate election was uncontested and a Democratic candidate of Native American descent was elected.

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2.2 LD 12

LD 12 is not a benchmark district; however, we include a brief analysis of its candidates of choice because it is mentioned in other submitted documents. Hispanic voters in benchmark LD 12 slightly preferred the Democratic candidates across all five statewide races. In the US President 2004 and Secretary of State 2006 elections, we estimate that Hispanics voted for the Democratic candidate at a rate of 53%. In contrast, in the other three races we examine, we estimate that Hispanics voted for the Democratic candidate at a rate of at least 67%. Based on these results, Hispanic voters in LD 12 appear to prefer Democratic candidates.

The State Senate 2008 election is also of interest. As Table 13 demonstrates, Hispanic voters preferred the Democratic candidate Angela Cotera (who does not belong to a minority group) by a substantial margin, voting for her at a rate of 73%. However, Cotera did not win the election. The State Senate 2010 election also did not include a candidate who belonged to a minority group. As before, Hispanic voters still preferred the Democratic candidate, voting for him at a rate of 65%.

We also examine the State House 2008 election. Two candidates in this election belonged to minority groups: Hispanic Republican Steve Montenegro and Hispanic Democrat Eve Nunez. Examining House elections is problematic from the perspective of making inferences about voting behavior of minority groups because each district elects two candidates (and voters cast two

votes). In this case, we allot the population two votes in our estimation procedure; results in Table 12 are accompanied by substantial uncertainties and we present them to provide a rough estimate of minority group voting behavior. As the table illustrates, we estimate that Hispanic voters in the district preferred the Democratic Hispanic Eve Nunez compared to Republican Hispanic Steve Montenegro; we estimate that 34% of all votes cast by Hispanics were for Nunez while 16% of all votes cast by Hispanics were for Montenegro. In fact, we estimate that Hispanic voters preferred the white Democratic candidate to Montenegro.

2.3 LD 13

Hispanic voters in benchmark LD 13 strongly preferred Democratic candidates across all five statewide races. In fact, we estimate that in each of the statewide races the vote share for the Democratic candidate was above 64%. In terms of local congressional elections in benchmark LD 13, both the 2008 and 2010 State Senate elections were uncontested. In each case, a Hispanic Democrat was elected to the State Senate.

2.4 LD 14

Hispanic voters in benchmark LD 14 strongly preferred the Democratic candidates across all five statewide races. In fact, we estimate that in each of the statewide races the vote share for the Democratic candidate was above 76%. In terms of local congressional elections in benchmark LD 14, both the 2008 and 2010 State Senate elections

were uncontested. In each case, a Democratic candidate was elected to the State Senate. In 2010 the unopposed candidate, Robert Meza, was Hispanic.

2.5 LD 15

Hispanic voters in benchmark LD 15 slightly preferred Democratic candidates. In the Secretary of State 2006 election, we estimate that only 51% of Hispanic voters preferred the Democratic Candidate. In the US President 2004 election, we estimate that only 53% of Hispanic voters preferred the Democratic Candidate. These are not large enough margins to give us great confidence that the Democrat is the candidate of choice; however, in the US President 2008, Mine Inspector 2010, and Secretary of State 2010 elections, the Democratic candidate received over 60% of the vote among Hispanic voters. Thus, overall, Democrats appear to be the candidates of choice among voters in benchmark LD 15. In terms of local congressional elections in benchmark LD 15, Hispanic voters preferred (at a rate of 60%) the Democratic candidate in the 2008 State Senate election; in 2010 the State Senate election was uncontested.

2.6 LD 16

Hispanic voters in benchmark LD 16 strongly preferred the Democratic candidates across all five statewide races. In fact, we estimate that in each of the statewide races the vote share for the Democratic candidate was above 78%. In terms of local congressional elections in benchmark LD 16, Hispanic voters strongly

preferred (at a rate of 83%) the Democratic candidate (an African-American Leah Landrum) in the 2008 State Senate election; in 2010 the State Senate election was uncontested and Leah Landrum won re-election.

2.7 LD 17

LD 17 is not a benchmark district; however, we include a brief analysis of its candidates of choice because it is mentioned in other submitted documents. Hispanic voters in benchmark LD 17 preferred the Democratic candidates in three of the five five statewide races that we examined. In the US President 2004 and Secretary of State 2006 elections, we estimate that Hispanics supported the Republican candidates, neither of whom belonged to a racial minority group. However, in the other three races we examine, we estimate that Hispanics voted for the Democratic candidate at a rate of at least 57%. Based on these results, we cannot generalize about who the candidate of choice might be for Hispanic voters in the district.

We also examine State Senator elections. LD 17 is of particular interest because Hispanic Republican Jesse Hernandez ran for office in both 2004 and 2008. Interestingly, we estimate that Hernandez was not the clear candidate of choice among Hispanic voters in either 2004 or 2008. Tables 43 and 44 suggest that Hernandez received less than half of the vote share among Hispanic voters in both elections. This comes with the caveat that these estimates are particularly uncertain, as is clear from even an examination of the tomography plots displaying

the Hispanic vote for Hispanic candidate included in our web appendix.

The State Senate 2010 election did not include a minority candidate; however, we estimate that Hispanic voters still strongly preferred the Democratic candidate, as Table 45 illustrates.

2.8 LD 23

Hispanic voters in benchmark LD 23 strongly preferred the Democratic candidates across all five statewide races. In fact, we estimate that in each of the statewide races the vote share for the Democratic candidate was above 63%.

In terms of local congressional elections in benchmark LD 23, Hispanic voters strongly preferred (at a rate of 82%) the Democratic candidate in the 2008 State Senate election. This election pitted two candidates of Hispanic ethnicity against each other: the Hispanic Democrat Rebecca Rios and the Hispanic Republican Andre Campos. Nonetheless, Hispanic voters still strongly preferred the Democratic candidate. The 2010 State Senate election pitted the Hispanic Democrat Rebecca Rios against a Republican candidate who did not belong to a minority group. Hispanic voters in the district preferred the Democratic State Senate candidate (at a rate of 79%); however, this support did not prove to be enough to lead to re-election for Rios.

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2.9 LD 24

Hispanic voters in benchmark LD 24 strongly preferred the Democratic candidates across all five statewide races. In fact, we estimate that in each of the statewide races the vote share for the Democratic candidate was above 63%.

In terms of local congressional elections in benchmark LD 24, Hispanic voters strongly preferred (at a rate of 82%) the Hispanic Democratic candidate, Amanda Aguirre, in the 2010 State Senate election; however, LD this support did not prove to enough to elect Aguirre. In 2008 the State Senate election was uncontested and Aguirre won the seat.

2.10 LD 25

Hispanic voters in benchmark LD 25 strongly preferred Democratic candidates across all five statewide races. We estimate that in each of the statewide races the vote share for the Democratic candidate was above 65%.

In terms of local congressional elections in benchmark LD 25, Hispanic voters strongly preferred (at a rate of 89%) the Democratic candidate in the 2008 State Senate election; in 2010 Hispanic voters preferred the Democratic State Senate candidate (at a rate of 89%). In 2008, the Hispanic Democrat Manuel Alvarez prevailed over a Republican candidate who did not belong to a minority group. In 2010, Alvarez lost to a Republican candidate who did not belong to a minority group.

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2.11 LD 27

Hispanic voters in benchmark LD 27 strongly preferred the Democratic candidates across all five statewide races. In fact, we estimate that in each of the statewide races the vote share for the Democratic candidate was above 77%.

In terms of local congressional elections in benchmark LD 27, 89% of Hispanic voters cast their ballots for the Democratic State Senate candidate Jorge Luis Garcia, who is Hispanic. Garcia ran against a Republican candidate who did not belong to a minority group. In 2010, the Hispanic Democrat Oliv Cajero Bedford won the seat, which was uncontested.

2.12 LD 29

Hispanic voters in benchmark LD 29 strongly preferred the Democratic candidates across all five statewide races. In fact, we estimate that in each of the statewide races the vote share for the Democratic candidate was above 77%.

In terms of local congressional elections in benchmark LD 29, both the 2008 and 2010 State Senate elections were uncontested. In each case, the Hispanic Democrat Linda Lopez won the seat.

APPENDIX C — LETTER FROM CANTELME & BROWN, P.L.C. RE: ARIZONA CONSTITUTION'S REDISTRICTING CRITERIA

CANTELME & BROWN, P.L.C.

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July 18, 2011

Colleen Mathis, Chair
Scott Freeman, Vice Chair
Jose Herrera, Vice Chair
Linda McNulty, Member
Richard Stertz, Member
Arizona Independent Redistricting Commission
1100 W. Washington Street
Phoenix, Arizona 85007

Re: Arizona Constitution's Redistricting Criteria

Dear Chairwoman Mathis and Commission Members:

Appendix C

As you know from the July 8, 2011, IRC meeting, I represent the FAIR Trust, a group concerned with fair congressional and legislative district mapping. I write to emphasize and amplify several points I made in my remarks at the Call to the Public held at the IRC meeting of July 8, 2011.

1. **Competitiveness - The Arizona Constitution.** Competitiveness is one of the state constitutional criteria to be considered by the Commission. The question naturally arises, how does it fit into the hierarchy of the other redistricting criteria set forth in the Arizona Constitution at Art. 4, pt. 2, § 1(14)? The Arizona Supreme Court supplied the answer and explained how competitiveness fits in relation to the other goals:

> The constitution directs the Commission to favor competitiveness when doing so is practicable and will not cause "significant detriment" to the other goals. *Id.* art 4, pt. 2, § 1(14)(F) .... The direction that competitiveness should be favored unless one of two conditions occurs does not, contrary to the Commission's assertion, mean that the competitiveness goal is less mandatory than the other goals, can be ignored, or should be relegated to a secondary role. The constitutional language means what it says: The Commission should favor creating more competitive districts to the extent practicable when doing so does not cause significant detriment to the other goals.

Appendix C

Arizona Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 220 Ariz. 587, 598, ¶ 35, 208 P.3d 676, 687 (2009).

To illustrate application of the criteria, consider a hypothetical under which a redistricting commission has a duty to draw two districts in a jurisdiction in which only one city exists in a state, the city occupies the entire eastern half of the state, the unincorporated area occupies the entire western half, the population of the city is equal to that of the state outside the city, the minority population inside the city is identical to that outside the city, and the party registrations are 37% Republican, 33% independent, and 30% Democrat outside the city, and 37% Democrat, 33% independent, and 30% Republican inside the city. In this hypothetical, the commission can bisect the city and draw two districts nearly as competitive as one can ever get, both composed of party registrations of 33.5% Republican, 33.5% Democrat, and 33% independent. Yet if it were applicable, the Arizona constitution would forbid it. To achieve such competitive districts, the commission has to split the city, which would cause significant detriment to the community-of-interest and the city-boundary requirements of § 1(14)(D) and § 1(14)(E) of Art. 4, pt. 2, of the Arizona Constitution, and thereby would violate these subsections of the Constitution. Application of the Arizona criteria would mandate one district comprising the city, and one comprising the unincorporated area.

2. Competitiveness - Actual Results. A certain conventional wisdom has developed that your predecessor commission failed to develop an adequate number

of competitive districts after application of the state constitutional criteria. As is common with conventional wisdom, the facts prove it to be in error, belied by actual election results.

In the five congressional elections conducted in eight districts since the predecessor IRC 2002 congressional plan went into effect, Democrats have won 16 and Republicans have won 24 congressional seats. The first two of these elections, however, were influenced heavily by incumbency. Congressmen Flake, Hayworth, Kolbe, Pastor, and Shadegg all were incumbents, who enjoyed the natural advantages of such status. . In the last three elections, with eight seats available in each election, Democrats won 12 seats and Republicans won 12 seats. I venture to say that few if any other states can match this record for competitiveness in the last three general elections.

The 2002 election for seats in the 46th Legislature was conducted under a plan stipulated to by Republicans and Democrats, endorsed on an interim basis by three Latino witnesses deemed experts by the Court (Maricopa County Supervisor Garrido Wilcox, State Senator Rios, and State Senator Valadez), and ordered into effect by a three-judge panel of the United States District Court in *Navajo Nation v. Arizona Independent Redistricting Commission*, 230 F.Supp. 2d 998 (D.Ariz. 2002). The 2002 election produced a 17 Republican to 13 Democrat split in the Arizona Senate, and a split of 39 Republicans, 20 Democrats, and one Independent in the Arizona House of Representatives.

Appendix C

Given the imprimatur of the three-judge federal court, the stipulation to its adoption by both the Republican and Democrat sides, and the endorsement of the three minority witnesses (all three officer holders of many years of experience), it is fair to consider the court-ordered 2002 plan as a benchmark, given the constraints of the Voting-Rights Act, and Arizona demography, geography, and party registrations.

The court-ordered plan was in effect only for the 2002 election. The IRC developed a replacement plan in 2003, DOJ pre-cleared it in 2003, and it went into effect for the next four general elections. Elections taking place subsequent to the three-judge plan yielded the following results:

Election	Senate		House	
	Republican	Democrat	Republican	Democrat
2004	18	12	39	21
2006	17	13	33	27
2008	17	13	36	24
2010	21	9	40	20

These results produced an average of 37 Republicans and 23 Democrats in the House, two fewer Republicans and two more Democrats than the benchmark; and an average of 18.25 Republican members and 11.75 Democrat members in the Senate, slightly more Republicans and slightly fewer Democrats than the benchmark. Both averages, however, were skewed upwards by the 2010 results, the

product of an atypical wave election influenced by national politics and by calls from some politicians to boycott Arizona.

Even with 2010's onetime fillip to the Republicans, the election results under the IRC plan in four elections cannot be considered significantly different from what the court-ordered, stipulated, and endorsed plan yielded. What's more, these results were produced in a decade in which the percentages of party registrations declined and the numbers of independent registrations increased.

These results also billboard the fact that it is impossible in Arizona to draw a map with 30 competitive districts or even a map with ten Republican districts, ten Democrat districts, and ten competitive districts. The Voting Rights Act, the Fourteenth Amendment, and the state constitution's neutral requirements of equal population, respecting communities of interest, respecting city and county lines, compactness, and contiguity all interact to constrain the number of competitive districts that can be drawn. That is what Proposition 106 provided, and that is what the majority voted for when they passed the proposition at the 2000 election.

3. **Communities of Interest.** Mapping Consultant Strasma suggested that the Commission not adopt a definition of communities of interest, or at least not yet, and that it allow communities to self-identify and percolate up from the grass roots. I must respectfully disagree with the first part of Mr. Strasma's recommendation. Since 2002, I have argued that, to proceed fairly, evenly, and

transparently, the Commission must define communities of interest and competitiveness and apply the adopted definitions equally around the state. It will undercut the public's confidence in the Commission if it adopts an I-know-it-when-I-see-it approach, in lieu of definitions evenly applied statewide. I have always believed that a genuine criticism of your predecessor commission is its failure to have done so, even if the appellate courts did not find constitutional error therein. A less rigorous approach invites a criticism of selective enforcement, which could tar the Commission's reputation for fair and even treatment of all communities in all corners of the state.

4. Voting Rights. Arizona's history bears the indelible stain of discrimination against its Latino, Native-American, Asian-American, and African-American citizens. Within the memory of many Arizonans, African-American children were segregated in high school at Phoenix and Tucson, Latino children were relegated to the "Mexican room" at many elementary schools, and Native Americans were denied the right to vote. We take no back seat in lamenting Arizona's sad history of discrimination against her own people, yet we acknowledge that points of light peered through this darkness to guide us to a better way. We prize Justice Levi Udall's opinion for the Arizona Supreme Court in *Harrison v. Laveen*, 67 Ariz. 337, 196 P. 2d 456 (1948) striking down the refusal to allow Native Americans to vote as a landmark on the road to justice in Arizona. We also take pride in then Judge (later Chief Justice) Struckmeyer's opinion and order in *Phillips v. Phoenix Union High School and Junior College District*, No. 72909, Arizona Superior Court, Maricopa County

(Feb. 9, 1953), rejecting school segregation before the United States Supreme Court had acted.[1]

In this vein, we highly urge this Commission to strictly enforce both sections 2 and sections 5 of the Voting Rights Act. The 2010 census found the Latino population to comprise 29.5% of the state's total population. With this population percentage, section 2 requires, on the congressional side, the creation of two Latino-majority districts and one influence district. On the legislative side, it requires the creation of nine Latino-majority districts, if geography and demography permit them without running afoul of *Shaw v. Reno*, 509 U.S. 630 (1993). We further urge the Commission to determine in open hearing what level of voting-age population it will require in minority districts to ensure the rights of minorities to elect candidates of their choice. Last, we note that Congress reauthorized the Voting Rights Act in 2006, and in doing so it rejected the use of coalition or influence districts to satisfy sections 2 or 5, as had been approved in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Thus, to anyone who suggests that coalition or influence districts can be created for the sake of drawing more competitive districts, we respond that doing so violates voting rights and must be rejected. This is not what Arizona wanted when its voters passed Proposition 106. The voting rights of our minority citizens are sacred and cannot be sacrificed for other ends.

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1. Chief Justice Struckmeyer had fought in France, was highly decorated, and knew by blood and sacrifice what freedom meant. He returned to Arizona later to hold in the cited case, "A half century of intolerance is enough."

Thank you for your attention to this matter.

Very truly yours,

CANTELME & BROWN, P.L.C.

s/_____
By: David J. Cantelme

cc. Mary O'Grady, Esq.
Joseph Kanefield, Esq.

APPENDIX D — EXPERT REPORT OF PROFESSOR BRUCE E. CAIN

Expert Report of Professor Bruce E. Cain

Wesley W. Harris et al. v. Arizona Independent Redistricting Commission, et al.

Qualifications:

I am the Charles Louis Ducommun Professor in the Humanities and Sciences and Director Designate of the Bill Lane Center for the American West, Stanford University. Currently, I am in residence for academic year 2012-13 at NYU Law School as a Fellow at the Straus Institute for the Advanced Institute for Law and Justice. I have written extensively on redistricting and voting rights, including two books (*The Reapportionment Puzzle* and *Congressional Redistricting*) and numerous articles in political science and law journals. Most recently, I authored "Redistricting Commissions: A Better Political Buffer?" 121 *The Yale Law Journal* 1808, 2012 and coauthored "Community Interest Methodology and Public Testimony," *UCI Law Review*, forthcoming.

I have served as a redistricting consultant on numerous occasions since 1981 at the local, state and federal level. This includes: the California legislature, 1981 and 1982; the Los Angeles City Council, 1986; the Attorney General of the State of Massachusetts, 1987-88; the U.S. Justice Department, 1989; Los Angeles County, 1991; the Oakland City Council, 1993; the San Diego Citizens Commission on Redistricting, 2001; the City and County of San Francisco, 2002; Special Master for three

judge panel, Arizona State Legislative Redistricting, 2002; and the Maryland Attorney General's Office, 2011. In my capacity as Special Master in Arizona, I assisted the three-judge panel in reviewing the AIRC's response to the Justice Department's Section 5 objection to Arizona's proposed new state legislative plan.

I have been an expert witness in a number of cases, including *Badham v. Eu,* 1984; *Service Employees International Union, AFL-CIO, CLC et al. v. FPCC,* 1990; *City of New York et al. v. U.S. Department of Commerce,* 1992; *Smith v. Regents of the University of California et al.,* 1995; *California Democratic Party v. Bill Jones,* 1997; *California Pro-Life Council, Inc. v. Karen Getman et al. and Bill Lockyer,* 2004; *New York State Board of Elections: Neil W. Kelleher, Carol Berman, Helena Moses Donohue, and Evelyn J. Aquila,* 2004; *Fletcher v Lamone,* 2012; and *In the Matter of the 2012 Legislative Redistricting of the State,* 2012.

I have not been deposed or testified during the last four years. My compensation is $250.00 per hour. A list of my publications in the last ten years is provided as an appendix.

For this report, I have reviewed the following documents:

1. *US Department of Justice Submission under Section 5 of the Voting Rights Act of the State Legislative Redistricting Plan by the AIRC,* February 12, 2012, including exhibits and appendices

Appendix D

2. *An Analysis of the Arizona Independent Redistricting Commission Legislative Districting Map* by Gary King and Benjamin Schneer, February 24, 2012

3. Candidates of Choice Supplement to *An Analysis of the Arizona Independent Legislative Redistricting Map*, by Gary King and Benjamin Schneer, February 26, 2012

4. Order Denying Motion to Dismiss 11/16/12

5. Plaintiff's Second Amended Complaint 11/16/12

6. Expert Report of Thomas Brooks Hofeller 12/17/12

7. Affidavit of Thomas Brooks Hofeller 6/25/12

8. Affidavit of Thomas Brooks Hofeller 9/7/12

9. Motion to Dismiss 8/3/12

10. Motion to Dismiss Exhibits 8/3/12

11. Plaintiff's First Amended Complaint 7/5/2012

12. 2011 DOJ Redistricting Guidelines, 76 Fed Reg. 7470 (Feb. 9, 2011)

13. Text of Commission's 8/23/2002 revised legislative preclearance submission

14. 76 Fed. Reg. 12369

Appendix D

15. 11/29/11 Draft report of Prof. Gary King and Ken Strasma

16. Article 4, part 2, section 1 of the Arizona Constitution

17. NCSL Congressional and State Legislative Deviation Table

18. 2012 November Election Results for AZ and breakdown of Senate and President races by legislative district

19. DOJ objection letters

Report:

1. I understand that the Plaintiffs' claim is that the Arizona Independent Redistricting Commission "systematically overpopulated Republican districts and under-populated Democratic districts for the sole purpose of maximizing Democratic Party strength in the state legislature." Court's 11/16/12 Order at 5. The purpose of this report is to review the AIRC's procedures, criteria and district rationales in order to assess whether there were valid reasons related to state and federal criteria for the observed population deviations.

2. I understand that under the federal Equal Protection Clause a state must make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable, but that mathematical precision in legislative districts is not required. Instead,

states may exercise some flexibility in constructing legislative districts as long as the divergences in population among districts are based on legitimate considerations that are incident to a rational state policy. I further understand that the deviations must result from factors that are free from any taint of arbitrariness or discrimination. Traditionally, an overall deviation within 10% has been the norm for legislative districts. Finally, I understand that the trial court has said that Plaintiffs must prove any deviation is "an arbitrary or discriminatory policy" and that Plaintiffs must prove that "the asserted unconstitutional or irrational state policy is the actual reason for the deviation."

3. The Commission is composed of five citizen-volunteers. The Commissioners hire a mapping consultant and legal counsel to assist them with the technical and legal aspects of redistricting.

4. The question at hand is not whether there is one optimal plan that completely satisfies all redistricting criteria and public demands. No such plan exists because there are inevitable tradeoffs between different criteria and interests in all proposals. A decision to put more weight on one of the criteria will often make it harder to satisfy other goals. Slightly under-populating districts can preserve communities of interest, avoid splits of local jurisdictional lines or enhance the prospects for an under-represented minority to elect a candidate of choice. Conversely, adopting a strict population rule can limit the ability to achieve goals such as these.

5. Slightly under-populating some districts logically means that others have to be slightly over-populated given that the population deviations around the ideal number have to sum to zero. Inevitably some groups or communities will consider themselves to be worse off with respect to a particular redistricting indicator. In a well-designed plan, they will not be worse off on all indicators.

6. There is also no dispute as to whether the AIRC met the well-established population standard for legislative districts. All parties agree that the total deviation of the AIRC's legislative plan is 8.8%, well within the commonly used 10% total deviation. Most of the other states also have used their population deviation discretion when adopting legislative districts this decade. The purpose of allowing state legislative population deviations within a specified range of the ideal district number as opposed to requiring exact population equality is to give the State some flexibility in line drawing options in order to accommodate other important redistricting goals. Exact mathematical population equality is not possible in any event, as there are inevitable errors in the census and the population continues to shift after the census data is collected.

7. The Arizona Constitution sets out four criteria in addition to the federal criteria such as population equality and adherence to the requirements of the Voting Rights Act. They are "to the extent practicable" geographic compactness and contiguity; respect for

communities of interest; use of visible geographic features, city, town and county boundaries, and undivided census tracts; and competitive districts if they create no significant detriment to the other goals. I understand that the Arizona Constitution establishes a four phase process for redistricting. In the first phase, the Commission creates "districts of equal population in a grid-like pattern across the state." Ariz. Const. art. IV, pt. 2, § 1(14). In the second phase, the Commission adjusts the equally populated grid map "as necessary to accommodate" six goals in the Arizona Constitution. These goals are (1) compliance with the United States Constitution and the Voting Rights Act; (2) equal population among districts to the extent practicable; (3) geographically compact and contiguous districts to the extent practicable; (4) district boundaries that respect communities of interest to the extent practicable; (5) district lines drawn using visible geographic features, city, town and county boundaries, and undivided census tracts to the extent practicable; and (6) to the extent practicable, competitive districts, where such districts would create no significant detriment to the other factors. Ariz. Const. art. IV, pt. 2, §§ 1(14)(A)-1(14)(F). The Commission must exclude "[p]arty registration and voting history data ... from the initial phase of the mapping process[,]" but may use that data to "test maps for compliance with the above goals." *Id* § 1(15). In the third phase, the Commission "advertise[s] a draft map" of the legislative districts to the public for at least thirty days to permit public comment. *Id.* § 1(16). During

the comment period, "[e]ither or both bodies of the legislature may ... make recommendations to the independent redistricting commission[,]" and those recommendations shall be considered by Commission. *Id.* In the final phase, the Commission establishes final district boundaries. I understand that places of residence of incumbents or candidates may not be identified or considered. *Id* § 1(15).

8. I considered whether meeting the Voting Rights Act Section 5 standard and the four state constitutional criteria can account for the observed population deviation pattern in the AIRC's state legislative plan. My conclusion based on the data and the record of AIRC proceedings is that the distribution of under-populated and over-populated districts can be explained by the AIRC's concern with Section 5 compliance and other state criteria.

9. In arriving at this conclusion, I looked not only at statistical evidence, but also AIRC Commissioner statements and testimony during the public meetings. Citizen commissions operate with more transparency and receive more public input than often occurs with legislative and court redistricting efforts. The AIRC went to extraordinary lengths to get public comments on their proposals at various stages of the line drawing process, including 23 public hearings in the first round and 30 more in the second round. All AIRC business meetings also provided opportunities for public comment. The Commission estimates that over 2000 people attended hearings that were streamed live by

Internet and archived for subsequent viewing. The AIRC incorporated some of the public submissions into their proposals. Specific alterations to the AIRC draft maps were documented in change orders that allow us to follow the Commission's rationale in constructing districts the way it did. The record of these proceedings clearly demonstrates the AIRC's concern about avoiding a repeat of Arizona's past difficulties in meeting Section 5 requirements and balancing other goals such as minimizing city/county splits, observing communities of interest, achieving compactness, and creating competitive districts to the extent practicable and without detriment to the other goals.

10. As a "covered jurisdiction" under the Voting Rights Act, Arizona must obtain preclearance from the U.S. Department of Justice or a judgment from the District Court for the District of Columbia before its redistricting plan can go into effect. Department of Justice guidelines (76 Fed Reg. 7470, Feb. 9, 2011) state in part that "in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. ... [C]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact on the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change." Therefore, a functional analysis requires additional

information about the jurisdiction's election history, voting patterns, voter registration and turnout data. This data is used to assess several factors related to Section 5 compliance: whether minority voting strength is reduced by the proposed redistricting; whether minority concentrations are fragmented among different districts; whether minorities are over-concentrated in one or more districts; whether alternative plans satisfying the jurisdiction's legitimate governmental interests exist, and whether they were considered; whether the proposed plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and whether the plan is inconsistent with the jurisdiction's stated redistricting standards.

11. In determining the number of benchmark ability-to-elect districts, the Commission looked at election results over several previous elections, not just 2010. For example, Professor Gary King and Ken Strasma provided a memorandum to the Commission on 11/29/2011. That memo contained data relevant to the number of benchmark districts. It listed State Senate races featuring minority and nonminority candidates for 2004 to 2010. Although it did not necessarily follow that these were ability-to-elect districts for purposes of Section 5, based on those results, there were 10 districts where minorities had success in electing minority candidates of choice: benchmark Districts 2, 13 to 16, 23 to 25, 27, and 29.

12. The 2010 map is the first legislative redistricting map in Arizona to be precleared on the initial try since Arizona came under Section 5. Arizona drew objections in the 1980, 1990, and 2000 cycles. Moreover, the objection in 2000 is notable because it was not just based on retrogressive effect but also in part on discriminatory intent. These are all factors that would suggest caution when attempting to craft a plan that will achieve preclearance.

13. Arizona has 30 legislative districts. The ideal population for each using the 2010 census numbers is 213,067, which is derived by taking the state's population and dividing by 30. A deviation of plus or minus 5% (for a total deviation of 10%) would range from a high of 223,720 to a low of 202,414. The lines drawn in the previous redistricting had fallen well out of that range: the old districts varied between a high population of 378,298 (+77.5%) to a low population of 155,897 (-26.8%). The final plan adopted by the AIRC had population deviations of +4.1% to -4.7%. None of the 30 districts has the exact ideal population number. Eighteen have populations above the ideal number and twelve fall below. The average deviation is a relatively low 2.26%.

14. The National Conference of State Legislatures has collected data on State Senate legislative population deviations in the latest round of redistricting. Of the 35 states that the NCSL had data for, 3 states had total population deviations for their state senate districts at or above 10%, and 6 had total population

deviations below 1%. Twenty-six states had total deviations between 1% and 9.9%, 9 of which had total deviations between 9% and 9.9%.

15. There are several points to note about this. First, most states (29 out of 35) made use of total population variations above 1%. Second, Arizona's total variation was not among the highest; 12 had variations in excess of 9%, while Arizona's was below 9%. Third, all of the other Section 5 states in the NCSL sample created legislative maps with allowed population deviations: Texas (8.04) and Virginia (4.0) plus two other states at higher levels than Arizona, Louisiana (9.86) and South Carolina (9.55).

16. The question then is how to characterize the population deviation distribution. As with so many redistricting issues, this is more complex than it might initially seem. To begin with, determining "partisan bias" requires the classification of districts by party. To do this before there is an actual election using the new lines, the AIRC had to rely on political indicators and projections. The initial step in Arizona's redistricting process uses a grid methodology based solely on population. Political data are introduced into the process in order to do Section 5 Voting Rights analyses and to assess the competitiveness of the districts as required by the Arizona state constitution.

17. In their complaint, Plaintiffs rely on a very simple partisan measure—i.e., a party registration score. It takes the difference between Democratic and

Republic registration, and assigns a district to the party with more registrations, no matter how small the difference. This procedure works best when party registration differences are large. It becomes less reliable as the margins get smaller. Most political scientists and election handicappers take a more sophisticated approach, incorporating historical election returns as well as registration data, and developing more nuanced classifications than a simple dichotomy. Because there are varying degrees of uncertainty about likely district control, modern political analyses distinguish between safe, party leaning and toss-up districts. Assigning districts with checkered electoral results to political parties based on small registration margins can be very misleading.

18. The AIRC took the more sophisticated approach, looking carefully at past electoral returns in order to assess whether a district might be competitive or not. They developed 9 separate indices, combining registration and election returns between 2004 and 2010 in various ways. This gave them a better sense of the range of possible electoral outcomes in a given district over time. Using this methodology, there were 3 districts in the enacted plan that consistently yielded single digit scores across all of the 9 measures-LDs 8, 9, and 10. I would call them competitive. These districts had population deviations of -2.2%, 0.1% and 0.9%, respectively. There is no apparent bias in this pattern.

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19. Taking the marginal districts out of the mix (i.e., 8, 9 and 10) leaves 27 districts remaining. Of these 27, 7 of the districts (6, 11, 13, 15, 23, 26, 29) had very small population deviations of less than 1%. To put it another way, the AIRC did not use its population discretion in constructing these districts. If we set aside the *competitive districts* (because they cannot be classified as being for one or the other party with any certainty) and the districts with the plus or minus *1% population deviations*, there are 20 remaining districts (12 Republican and 8 Democratic) that can be classified for one of the parties based on the 9 competitive index scores. The 12 Republican districts are over-populated by more than 1%, and the 8 Democratic districts are under-populated by more than 1%. However, *all 8 Democratic districts are majority-minority ability to elect districts.* In other words, there is a clearly valid, rational state purpose—complying with Section 5 of the VRA—behind this population deviation pattern.

20. Even keeping districts with less than 1% population deviations in the mix or not characterizing LD 9 as competitive, it is clear that the population differences are the result of the Voting Rights opportunity districts. Of the 11 Democratic districts identified by the 9 indexes, two are slightly overpopulated (LD 9, 26) and the rest are under-populated majority-minority ability-to-elect districts. If the intent had been to help Democrats per se, the AIRC should have under-populated all of the competitive and Democratic leaning districts, not just the minority opportunity districts. This is not the pattern we see.

21. The AIRC devoted much attention to defining and identifying minority opportunity districts. Bearing in mind that the AIRC in the post 2000 Census redistricting had been challenged the prior three decades on Section 5 grounds by the Justice Department, it was understandable that the AIRC would be especially careful in this regard in 2011. The decision to under-populate the Section 5 districts is consistent with the general pattern of VRA care and caution I saw in the record. The AIRC hired an experienced VRA expert, Bruce Adelson. In the briefings they received from him, he advised them that they could under-populate minority-majority districts in order to achieve VRA goals, as the first AIRC had done a decade earlier. They held numerous hearings in minority areas and took testimony from groups and individual from those communities.

22. I saw considerable evidence in the record of the proceedings that the effort to avoid retrogression was made in good faith and was not a partisan issue. The Commission adjusted the initial grid maps to build Section 5 districts, looking at various alternative ways to do this and then combining the suggestions where possible. The transcripts for the period October 5 to 9, when the AIRC was seeking to merge two proposals into one, indicate that the Commissioners were actively seeking ways to enhance minority representation. For example Commissioner Freeman, a Republican, had been working on a map. *See* 10/3/2011 Map, 9 Minority Districts Options 1 version 8a. Likewise, Commissioner McNulty, a

Democrat, had also been working on a draft map. *See* 10/3/2011 Map, 9 Minority Districts Options 2 version 8a. The Commission merged the two maps using Commissioner Freeman's map as a starting point in Maricopa County, where it contained four majority minority districts, and Commissioner McNulty's map in southern Arizona where it contained three majority-minority districts. 10/5/11 Tr. at 95. Both maps contained a majority Native American district in Northeastern Arizona. Thus, the merged map contained eight majority minority districts.

23. Before approving the draft map, the Commission worked to create two additional majority-minority districts in Maricopa County, Districts 24 and 26, and to otherwise strengthen the map. *See, e.g.*, 10/6/11 Tr. at 108-11, 185-99; 10/7 Tr. at 38-49. The Commission made many changes with that intention, such as: splitting Yuma County to improve the minority opportunities in southwestern Arizona (e.g., 10/3/11 Tr. at 190-91; 10/10/11 Tr. at 204-05); maintaining three majority-minority districts in southern Arizona as the constant for all plans in that part of state (10/10/11 Tr. at 20, 206; 10/3/11 Tr. at 220-21); including the Navajo Nation with the White Mountain and San Carlos Apache Tribes in a majority Native American District *(e.g.*, 10/3/11 Tr. at 226).

24. The draft map was adopted by a 4-1 vote. No Commissioner criticized the map on the ground that there were too many voting rights districts in Maricopa County. *See* 10/10/2011 Tr. at 202-10.

Therefore, based on the public record, the creation of ten voting rights districts was not seen as a partisan issue or a pretext for maximizing Democratic representation in the legislature, as Plaintiffs now claim.

25. Again in the period from November 29 to January 17, when the AIRC was making its final changes, evidence of their determination to resolve any Section 5 issues completely is quite clear. Consider, for instances, the change orders given to their technical staff in this period to strengthen proposed LDs 24 and 26. *See, e.g.*, Exhibit 5-A-4-B[1] (Improve VRA LD 24 Change Order Map); Exhibit 5-A-4-N (Improve VRA LD 26 v2 Change Order Map); Exhibit 5-A-4-P (Improve VRA LD 26 v3 Change Order Map); Exhibit 5-A-4-BB (Improve VRA LD 26 v4 Change Order Report).

26. The public record shows that the Commission's adjustments from draft to final were made for legitimate purposes, including strengthening the ability-to-elect districts. For example, the Commission improved ability-to-elect Districts 24 and 26 in Maricopa County *(see, e.g.*, Exhibit 5-A-4-B (Improve VRA LD 24 Change Order Map); Exhibit 5-A-4-N (Improve VRA LD 26 v2 Change Order Map); Exhibit 5-A-4-P (Improve VRA LD 26 v3 Change Order Map); Exhibit 5-A-4-BB (Improve VRA LD 26 v4 Change Order Report)), as well as ability-to-

1. Exhibit references are to the exhibits in the Commission's legislative preclearance submission.

elect District 4 in southern Arizona. The Commission also strengthened and incorporated public comment related to District 7, the Native American ability-to-elect district. *See* 12/9/11 Navajo Nation LD 7 Change Order (incorporating parts of Improve VRA LD 7 12/8/11 and change orders regarding Schultz Flood area). It also adjusted District 8 in Pinal County, both to improve its competitiveness and preserve opportunities for minority voters in that area. *See* Improve Competitiveness of 8-11 Change orders; create VRA LD 8 v 2 McNulty. And it made other adjustments, such as removing the "tail" of Draft LD 2 into Cochise county and responding to public comment regarding keeping the I-19 Corridor between Tucson and Nogales in the same district. *See* 12/5/11 Cochise County & Green Valley Change Order.

27. With regard to improving District 24, the Commission's changes included removing sections of the draft district with fewer minority voters (this included a portion of south Scottsdale, and an area near 32nd Street and Indian School Road in Phoenix). *See* Exhibits 5-A-4-B and 5-A-4-L. Total Hispanic population in District 24 increased from 38.6% in the draft map to 41.3% in the final map, and HVAP increased from 31.8% to 34.1%. *Compare* Exhibit 5-A-3, with Exhibit 2-A. Total minority population increased from 53.6% to 55.1%, and minority VAP increased from 46.2% to 47.6%. *Id.* The Commission made modifications to two Native American reservations—it moved the Fort McDowell reservation at its request, and it moved the

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Salt River Pima-Maricopa reservation to District 26 to strengthen the minority ability to elect there. *See, e.g.,* Exhibit 9-M; *see also* 12/5/11 Tr. at 187-88; 12/8/11 Tr. at 70. In addition, to improve the ability to elect in District 26, the Commission removed a predominantly White Non-Hispanic area called Dobson Ranch in Mesa (Exhibits 5-A-4-S and 5-A-4-BB; 12/19/11 Tr. at 62) and added part of south Phoenix that had a high-minority population (Exhibit 5-A-4-BB; 12/19/11 Tr. at 63). It is also important to note that the Commission considered other ways to strengthen the ability to elect for District 26, but rejected them due to concerns about splitting communities of interest, specifically with the option of adding Guadalupe *(e.g.,* 12/9/11 Tr. at 26-29 (Richard Miranda stating that Guadalupe should be kept with south Phoenix); 12/15/11 Tr. at 107-09 (comment from Sally Ann Gonzales to keep Guadalupe with south Phoenix); 12/19/11 Tr. at 67-68 (Comment from Richard Sanchez)), or weakening the ability to elect with respect to parts of Mesa in District 18 (Exhibit 5-A-4-N). With respect to District 4 in southern Arizona, the Commission looked at adding areas with Hispanic voters and removing White Non-Hispanic areas to improve the ability to elect. It also adjusted the district boundaries to improve the ability to elect. *See* Exhibit 5-A-4-O; 1/10/12 Tr. at 60; Exhibit 5-A-4-A (Improve VRA LD 4 Change Order Map); Exhibit 5-A-4-1 (Improve VRA LD 4 v2 Change Order Map). These changes were documented in the Commission's submission to the Department of Justice.

28. The AIRC understood that it could not retrogress from the benchmark districts without incurring a Justice Department objection. Given the uncertainty of what would be considered by the Justice Department an ability-to-elect district in the old plan, the Commissioners felt it was necessary to create 10 ability-to-elect districts. They incorporated specific suggestions such as the Arizona Minority Coalition's plan for three majority-minority districts in Maricopa County and Native American proposals for LD7. They hired a renowned expert in political methodology, Professor Gary King of Harvard University, to perform statistical tests on their tentative map to assess the ability of the under-represented groups to elect a candidate of choice and to propose changes if necessary. In sum, the transcripts clearly demonstrate that the AIRC was determined not to fail the Section 5 requirements. In the end, their efforts were successful.

29. The previous decade's Commission originally purported to create 10 districts in which minorities would be able to elect candidates of choice. *See* 8/23/2002 Letter from L. Hauser to DOJ at 1. Nonetheless, the DOJ objected, said that the Commission had only created five, and required the Commission to strengthen three districts. Therefore, 50% of the districts that the Commission had offered as minority ability-to-elect districts were held not to be by the DOJ, and the Commission, even with a buffer of 20% (2 of 10), drew an objection. In adopting the map for this decade, the Commission did not know how

many ability-to-elect districts the DOJ would conclude were contained in the benchmark map, and therefore had to operate under uncertainty. Drawing an objection from DOJ is costly in various ways including the inability to bail out of Section 5 for 10 years, the cost of having to draft and seek preclearance of a new map, and the potential of having an election using an emergency map drawn by the court. Because the DOJ did not file an objection, the Commission still does not know how many ability-to-elect districts the DOJ concluded were present in the benchmark map.

30. The 2012 November election results provide further confirmation that the AIRC successfully created 10 minority-majority ability-to-elect districts. Two of the Arizona statewide races—the Senatorial race between Richard Carmona and Jeff Flake and the Presidential race between Mitt Romney and Barack Obama—featured matchups between white and nonwhite candidates who lost statewide. When we examine the results in the 1 0 districts the AIRC created to be in compliance with Section 5, we see that the nonwhite candidate prevailed in all of them. Based on these results, there is no apparent need that I can see to second-guess or remedy the AIRC's Section 5 efforts.

31. As noted in the House Concurrent Memorial of 2011, which was approved by the Republican majority in the Arizona Legislature, the AIRC under-populated the minority-majority ability-to-elect districts after the 2000 census and the Memorial did not criticize

this practice in the draft map it reviewed. HCM 2001, 50th Leg., 4th Special Sess. (2011). The AIRC in 2011 was continuing a policy that had been used in the past. The rationale for under-populating Section 5 districts is as follows. To begin with, minority areas have historically been undercounted by the census. While the biases have been reduced in recent years, the Latino population, in particular, is still difficult to count accurately due to the presence of undocumented workers and the housing arrangements they are forced to reside in. Secondly, under-represented minority communities typically have a lower ratio of voters to population, especially as compared to higher socioeconomic white neighborhoods. In Native American and black communities, this is because of lower rates of home ownership and education. Home ownership matters because renters move more often and are more likely to become unregistered. Education matters because it affects issue knowledge and the ability to navigate voting eligibility and participation rules. Hispanic areas have the additional problems of lower than average levels of citizenship, English language skills and voting age population. As a consequence, adding higher socio-economic tracts to a Section 5 district can negatively affect a majority minority community's ability to elect more than the mere population numbers would ostensibly suggest.

32. Under-populating minority ability-to-elect districts thus serves a protective purpose in the sense that it minimizes the necessity of importing higher socio-economic census tracts in order to balance

populations exactly. It also eases the burden of hitting the specific benchmark totals required by Section 5. Retrogression logic requires that the new districts do no worse than the status quo districts. Hitting benchmark goals is easier when there is a lower population option as the census tract and bloc choices on a district's periphery might have below non-retrogressive minority percentages, or require contorted non-compact geographic shapes to achieve the right mix of new population.

33. The latter point is particularly relevant when we bear in mind Professor King's sophisticated VRA analysis. His statistical models used five statewide races between 2004 and 2010 that featured white and nonwhite candidates in order to calculate a minority community's ability to elect a representative of its choice. The ability to elect is not merely a function of group size. It also depends on the cohesion of the minority group and the polarization levels of other racial groups in the district. In Figure 2 of his report on the legislative district plan, Professor King showed that white versus nonwhite polarization varies considerably across Arizona's legislative districts. This is important because it means the target minority population level can be lower where polarization is less and higher where polarization is greater. The AIRC relied on this logic in creating majority-minority Districts 24 and 26.

34. In Figure 3, Professor King assessed the ability to elect by incorporating both cohesion (support

among the main minority group) and polarization (support among the other racial and ethnic groups) considerations. Districts in the upper right hand quadrant fulfilled both conditions and demonstrated an ability to elect. While some of the benchmark districts fell out of the quadrant, none of the proposed ones did. But, a number of the proposed districts were very close to the line. This suggests the delicacy of these constructions and how they could be thrown off by small population changes.

35. The possibility that adding more population might actually weaken the ability to elect is suggested by the last part of Professor King's analysis. Assuming an ability to elect goal of 55% vote for the "candidate of choice," Professor King assessed both how many proposed Section 5 districts met this target and what it would take to bring the others up to the 55% level. He concluded that there was no feasible path to improving districts that fell below that 55% threshold. In short, adding more population for the sake of achieving nearly exact population equality was not going to improve the ability to elect.

36. In the end, it is clear that the AIRC followed the DOJ guidelines regarding a functional analysis, rather than only using census numbers, and used an abundance of caution to meet its VRA goals, in light of the uncertainty of the number of ability-to-elect districts that the DOJ would conclude were present in the benchmark map. Under-populating the ability-to-elect areas was one result of that approach. The

consequence was that the other districts had to absorb the excess population. Even so, five of the Republican districts and two of the competitive districts had trivial population deviations of plus or minus 1%. All but one of the majority white Republican district population deviations are under 4%. The AIRC under-populated 8 of the 10 opportunity districts by amounts above 1% and overpopulated 12 out of 17 majority white Republican districts by amounts over 1%. It also made specific efforts to reduce population deviations, for example in Population Balance Change Order (Exhibit 5-A-4-Y).

37. Did this result in any likely electoral harm for Republicans? The AIRC would have had no reason to think so. According to the 9 competitiveness indicators, the Republicans could count on 17 safe districts to 10 for the Democrats plus 3 additional competitive districts. This meant that the Republicans were assured at least 56.6% of the districts and had the potential of winning 67%. As a baseline comparison, their statewide two party registration share as of June 2012 was 54.4%. According to all 9 competitiveness measures and under a worst-case scenario that keeps the Republicans from winning any of the competitive districts, they would still get proportionate share representation and maintain control of the state legislature. And under more favorable electoral circumstances (*e.g.*, a national swing like the 2010 election), their majority could be greater than proportionate. There was no plausible scenario for Democratic control of the legislature as

their share was projected to vary between 33% and 43% (which is slightly below a proportionate share given their party registration of 45.6%).

38. As stated earlier, redistricting is about tradeoffs between competing values after basic constitutional requirements are met. The AIRC chose to use its population deviation discretion in order to meet its Section 5 obligations and to avoid the preclearance problems that the Arizona has had in the past. The tradeoff was higher population deviations for the predominantly white districts, of which almost 1/3 were deviations under 1%. Given the estimates from the competitiveness scores, the AIRC had no reason to believe that the Republicans would be treated unfairly as a result. All of the Democratic districts that were under-populated by more than 1% were Section 5 districts.

39. The AIRC also accomplished it many of its other goals as well as avoiding a Section 5 objection. The scores for compactness and city and county splits are quite good, for instance. It even had some success in achieving competitive districts. District 8, for instance, resulted in competitive races in the 2012 election with a Democrat winning a very close State Senate race and two Republicans winning the state House race

40. In sum, there appear to be valid, rational state purposes behind the observed population deviation pattern in the AIRC's adopted legislative plan. Its

purpose was to ensure that their districts would be precleared. The slight over-population in the majority white districts was a politically innocuous byproduct of that effort.

Dated this 15th day of January, 2013.

/s/
Bruce E. Cain

APPENDIX E — EXPERT REBUTTAL REPORT OF PROFESSOR BRUCE E. CAIN, DATED FEBRUARY 13, 2013

Expert Rebuttal Report of Professor Bruce E. Cain

Wesley W. Harris et al. v. Arizona Independent Redistricting Commission, et al.

1. In my January 15, 2013 report, I set forth my qualifications and experience in redistricting, my compensation for this work, my testimony within the last four years and my publications within the last ten years. The previous report also referenced the materials I consulted in the formulation of my analysis. That report, including the information referenced above, is incorporated herein by reference. In addition to the materials listed in my initial report, I have now consulted the following additional sources:

    a. Maps illustrating Plan X changes and maps comparing Plan X changes with AIRC districts

    b. Compactness and Competitiveness Report for Plan X

    c. Change Order for Plan X

    d. Splits Report for Plan X

    e. Components Report for Plan X

f. Report Comparing Compactness of AIRC Map and Plan X

g. 2012 Arizona Primary and General Election Canvasses

2. Dr. Hofeller's Report purports to show that the AIRC "appear[s] to have engaged in a cynical process of deliberately under populating Democratic districts ... to advantage of future Democrat legislative candidates," and "that there is no basis, under the requirements of Arizona redistricting criteria, for such high deviations." Moreover, he contends "[c]onformance with the Voting Right [sic] Act is factually clearly not a rationale for the IRC's violation of the equal population standard." He presents a minimal deviation plan (the so-called "Plan X") that he claims respects city and county boundaries while maintaining the "same or greater percentages of adult Latino population" as found in the AIRC's final plan.

3. I have reviewed the evidence in Dr. Hofeller's report and conclude the following: Dr. Hofeller's analysis exaggerates the partisan differences in the data and ignores all of the statements in the public record about what the AIRC was attempting to do. He alleges harm to the Republican candidates, but provides no evidence that these population deviations had any significant negative effect on Republican

state legislative candidates. Dr. Hofeller fails to see the purpose of those districts that fell below the ideal population because he adopts an extremely narrow definition of a Section 5 ability-to-elect district that conveniently ignores the majority Native American district and reduces the number of Hispanic ability-to-elect districts from 9 to 7. He also provides no refutation of the AIRC's Voting Rights expert's or the Commission's rationale for drawing the Section 5 seats as they did. Moreover, Dr. Hofeller ignores the Justice Department's guidelines for Section 5 preclearance and the supportive public statements of the very communities that he claims were subjected to "intentional invidious dilution." His minimal deviation plan lowers the number of ability-to-elect seats. In other words, Dr. Hofeller urges a state that has failed Section 5 preclearance repeatedly to ignore Justice Department preclearance guidelines, expert advice and public testimony in order to adopt a minimal population deviation plan with fewer ability-to-elect districts and no demonstrable political benefit. In my opinion, this is not good advice.

4. Dr. Hofeller exaggerates the partisan pattern in the data and downplays the AIRC's clear intent to satisfy the Voting Rights Act. To begin with, he claims that the range of population deviations in the AIRC's plan is "remarkably and unnecessarily wide," but provides no evidence

for this statement. As I discussed in my report, the average population deviation in the AIRC's plan is only 2.3%. Moreover, the range is not "remarkably wide." According to *NCSL* data, 29 of the 35 states it reviewed adopted plans with population deviations above 1%, including 12 states that had population deviations above 9% as compared to the AIRC's 8.78%. None of the other Section 5 states in the sample adopted minimal population deviation plans, including states where Republicans controlled the line - drawing process. Indeed, Louisiana and South Carolina both adopted state legislative plans with total deviations of 9.86% and 9.55%, respectively, and the total population deviation in Texas (8.04%) was very similar to Arizona's total deviation.

5. When describing the partisan differences in population deviations, Dr. Hofeller fails to distinguish between the sizes of the population deviations and assumes that even the smallest extra population imposes some sort of political burden. Using a simple measure of the difference between Democratic and Republican registration, he states that all but one (LD 13) of the Republican districts were over-populated. He fails to mention that 5 of these Republican registration plurality districts had population deviations under +1% and only 4 had population deviations above +3%. Most of the Republican districts had quite moderate deviations of between +1.1% and +2.9%.

6. When describing the partisan distribution of the district population deviations, he overlooks the fact that three districts (LDs 8, 9, and 10) were designed to be competitive based on various indexes the AIRC developed, and therefore less predictably Democratic or Republican than the other districts. In 2012, LD 8 which he classifies as Democratic was won by the Republican candidates for US President and US Senate. There is also some confusion in his report about LD 13, which is slightly under-populated. At one point in the report, he identifies it as a Republican district and at another he adds it to the list of under-populated Democratic districts.

7. However, most importantly, Dr. Hofeller downplays the fact that the clear intent in creating the majority-minority districts in the AIRC final plan was to satisfy the Voting Rights Act. He does this in several ways. First, he adopts his own standard for passing Section 5 preclearance, which appears to be drawing Hispanic seats as close as possible to 50% HCVAP. He disregards the AIRC's decision to draw 10 ability-to-elect majority-minority districts and mischaracterizes the AIRC's plan as creating "7 purported and weak ... Hispanic districts, only two of which had HCVAP's above the HCVAP of Benchmark District 27." He further concludes that based on these facts, the purpose was "to move substantial numbers of Hispanic voters into neighboring non-Hispanic white Democrat districts to shore up the Democrats' partisan advantage."

8. His analysis is problematic in many ways. First, it is clear from his discussion that he believes that ability to elect a candidate of choice only means electing Hispanic candidates: in other words, descriptive representation. He performs no Gingles tests to demonstrate that the non-Hispanic candidates were not the candidates of choice, or to determine the level of white-nonwhite polarization in these districts. He presents no evidence to suggest that 50% HCVAP is the right guideline. He does not dispute the voting analyses of the AIRC's expert, Professor Gary King. He demonstrates no concern about packing, which is a significant Voting Rights Act violation.

9. It is important to bear in mind that Arizona had repeatedly failed to achieve preclearance. To ensure that this would not happen again, the AIRC paid close attention to the Justice Department's published Section 5 guidelines (2/9/2011) that explicitly state that "the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district." This functional analysis goes beyond mere registration data to include electoral histories, turnout, and voting patterns in calculating retrogressive effect. Among the many factors the Justice Department

looks at is not just whether "minority populations are fragmented among different districts," but also whether "minorities are over - concentrated in one or more districts." It is clear from the public record that the AIRC was trying to steer a path between these two potential violations. By comparison, Dr. Hofeller's analysis seems to ignore the Department's guidelines and adopts the goal of HCVAP maximization.

10. The simple fact is this: all of the Democratic districts that fell below the ideal population were ability-to-elect districts. The fact that the districts were below the ideal population by small amounts helped the AIRC build its case for Section 5 preclearance. If this were a tactic for partisan advantage, one might expect to see it used in the construction of the competitive districts, but there is no consistent pattern in them. The only competitive district below ideal population was District 8, which was truly competitive and cannot properly be characterized as Democratic. In fact, District 8 leaned Republican in the index measures and voted for Republican candidates in the US President and US Senate races.

11. It is hard to comprehend why Dr. Hofeller believes that Republicans were disadvantaged by this pattern of under - population. He maintains that Hispanic populations were withheld from the Hispanic opportunity districts to advantage white Democrats. But how exactly? All of the

clearly Democratic districts were majority-minority districts. Adding a small number of low-voting Hispanic voters would pose no threat to the clearly Republican districts. Even in the competitive seats, because minority populations have lower voting rates than non-Hispanic whites, Republicans are not at a disadvantage. Of the competitive districts, LD8 has the highest minority percentage and was below ideal population, but a majority in LD 8 voted for the Republican candidates in the 2012 Presidential and US Senate races. In 2012, a full slate of candidates from the major parties ran in LD 8, and voters in that district elected one Democratic state Senator and two Republican state Representatives.

12. Moreover, as I pointed out in my report, there is no evidence of harm overall to the Republican candidates in Dr. Hofeller's analysis. According to the index projections, the Republicans could count on winning 17 districts, plus they had an opportunity to win in 3 others. This meant that their share of districts would likely range between 56.6% and 67% as compared to a two-party registration share of 54.4%. Democrats were looking at projected district shares between 33% and 43% with a two-party registration of 45.6%. There is no evidence of a fairness problem that needs to be remedied.

13. Dr. Hofeller's alternative Plan X aimed to draw districts with minimal population deviations

while improving or maintaining the same HCVAP percentages in the ability-to-elect districts. He achieved the first goal but not the second. Plan X has very small population deviations, ranging between -0.2% and +0.2%. But, comparing Plan X to the AIRC's plan, I find that he lowers the HCVAP in LDs 24, 26 and 2 by -7.3%, -2.7%, and -.2%, respectively. Plan X also only achieves HCVAP increase of over 1% in two instances (LD27 by 1.3% and LD30 by 2.1%), and in both instances these are both majority 18+ Hispanic population districts with total minority 18+ populations of at least 64.5% in the AIRC plan. In other words, he slightly increases the HCVAP in overwhelmingly minority districts but significantly weakens the minority percentages in two districts (from 47.6% to 37.7% in LD24 and from 47.7% to 43.3% in LD 26) that had very close to 50% minority 18+ populations. The shift in LD 24 is particularly significant, dropping its minority 18+ population by 10 points. These districts were considered ability-to-elect districts in the careful analysis of Professor King, which revealed low levels of polarization between white and minority voters in these districts. At no point does Dr. Hofeller question Professor King's conclusions or evidence. In other words, not only does Plan X fixate on one statistic, i.e., HCVAP – ignoring the Justice Department's more complex and nuanced functional analysis – but he even fails to achieve his limited goal of increasing or maintaining HCVAP in all the Section 5 ability-

to-elect districts, substantially weakening the minority population's ability to elect in two of these districts (LDs 24 and 26). Throughout his report, Dr. Hofeller simply ignores that the Commission intended to establish LDs 24 and 26 as ability-to-elect districts (e.g., Hofeller Report Paragraphs 16-18).

14. The two premises of the AIRC model are that the task of devising new districts should not be done by incumbent legislators and the public's input should be incorporated into the final boundaries. The Commission made its decisions regarding the legislative map after months of public comment and transparent debate about the various redistricting criteria. The changes made by Dr. Hofeller in Plan X do not reflect this extensive public testimony. His criteria for Plan X (set out in Paragraph 47 of his Report) fail to include several of Arizona's constitutional criteria, including, for example, communities of interest and competitiveness. By focusing on a minimal population deviation plan, he ignores policy choices that the Commission made regarding communities of interest and other redistricting criteria, in many cases disregarding public input. I will provide several examples.

15. Dr. Hofeller chose to move the predominantly white non-Hispanic area in Mohave County in northeastern Arizona from Legislative District 5 to District 7, the majority Native American

district. The Commission's earlier draft map had also included that portion of Mohave County in LD 7, but the Commission later decided to include it in LD 5, which contained all other parts of Mohave County that were not part of an Indian Reservation. (Change Orders Improve VRA of LD 7 12/8/11; Navajo Nation LD 7 Map 12/9/11; 12/9/11 Tr. at 14:12-15:15.) This move was supported by public testimony. (Bullhead City Hearing, 10/19/11 Tr. at 23:16-24:24, 30:21-32:18.) Commissioners also considered the impact of this change in light of other modifications they considered to LD 7. (12/8/11 Tr. 41:8-19, 43:5-8.) While Dr. Hofeller's map may reduce population disparities between Districts 5 and 7, it does so by ignoring these considerations and by making different policy choices regarding communities of interest and the best way to divide Mohave County.

16. Dr. Hofeller's plan also modifies the boundary between LD 6 and LD 7 north of Flagstaff in an area referred to as the Schultz Flood area. There was public testimony supporting including this area with Flagstaff in LD 6 because of the area's ties with Flagstaff. (Flagstaff public hearing, 10/13/11 Tr. at 23:1-25:14, 30:1-14, 32:8-19, 60:12-63:24, 72:19-74:22, 98:14-100:19.) The Commission modified the boundaries of LDs 6 and 7 based on this input (12/12/11 Tr. at 147:24-148:13) while Dr. Hofeller's map ignores the public testimony and moves some of this area back to LD 7.

17. Plan X brings LD 5 into Maricopa County and takes in an area that the Commission had decided to put in LD 13. The Commission's intent was to put more rural areas of Maricopa County in LD 13, but Dr. Hofeller's plan does not. The consideration here is community of interest, not partisanship. Under both the Commission's map and Plan X LD 13 is predominantly Republican. The Commission heard public testimony about keeping LD 13 rural and attempted to modify the draft map to respond to these concerns. (Yuma Public Hearing, 10/29/11 Tr. at 29:9-31:5, 35:1-37:11; 12/20/11 Tr. at 165:21-167:6, 204:16-209:4). Dr. Hofeller's map, by taking more population from Maricopa County and less from Yuma County, undermines the rural logic for LD 13.

18. In the Phoenix metropolitan area, among other things, Dr. Hofeller substantially changes Districts 24 and 26, undoing the AIRC's intention to create these two ability-to-elect districts. His LD 26 incorporates Mesa, the Salt River Pima - Maricopa Indian Community and parts of south Scottsdale. The Commission's map linked a smaller portion of south Scottsdale with LD 24, which extends east into Phoenix. Instead of linking North Tempe with west Mesa and the Salt River Pima-Maricopa Indian Community in LD 26, Dr. Hofeller links a smaller portion of north Tempe with portions of east Phoenix that the Commission had included in LD 24 and 28. This significantly alters the communities joined in these legislative districts.

19. Dr. Hofeller's map also substantially alters LD 30, which the Commission created as a Hispanic majority district on the west side of Phoenix. Dr. Hofeller extends the district into east Phoenix to pick up areas that the Commission had assigned to LD 24 as part of the effort to make LD 24 a district in which minority voters had the ability to elect a candidate of their choice. As explained in Paragraph 13 above, the Commission's LD 30 already had a majority - minority population over 60%. His map adds more Hispanic population to LD 30 at the expense of LD 24.

20. The alternative plan that Dr. Hofeller proposes separates Paradise Valley from areas such as Arcadia and the Biltmore. He places Paradise Valley in LD 28 but Arcadia and the Biltmore in LD 24. The Commission, after hearing public testimony about the connections between these areas, included them together in LD 28 (12/20/11 Tr. at 85:2-87:11, 89:5-90:18), rejecting a proposal that would have split these areas between different legislative districts. (12/20/11 Tr. at 202:20-24, 204:11-13.)

21. His map divides the "copper corridor" by placing most of the mining communities in LD 8 but putting communities in southeastern Pinal County, such as San Manuel and Mammoth, in LD 11. Testimony supported keeping the copper mining communities together and apart from the predominantly white non-Hispanic areas such as

Oro Valley, which are in LD 11. (San Carlos Public Hearing, 10/21/11 Tr. at 88:4-91:14.) Dr. Hofeller's alternative does not keep the "copper corridor" together, ignoring this community of interest consideration. The Commission attempted to make LD 8 more competitive and provide as much opportunity as possible for the minorities in that district to have the ability to elect the candidate of their choice. (12/16/11 Tr. at 137:4-141:15, 144:6-145:25, 179:16-182:25; 12/19/11 Tr. at 5:5-51:25.) Instead, Dr. Hofeller's map makes LD 8 less competitive and less Hispanic.

22. Dr. Hofeller's map changes the boundaries within Tucson's Hispanic neighborhoods. His map abandons the 22nd Street boundary that the Commission selected after hearing public testimony. It also moves the predominantly Hispanic town of South Tucson from LD 3 to LD 2. The Commission received specific testimony regarding district boundaries within Tucson, and his report does not appear to consider communities of interest within these neighborhoods. (12/20/11 Tr. at 73:6-84:20, 184:4-197:7.)

23. Dr. Hofeller's alternative divides the Rita Ranch area south of Tucson in a manner different than the Commission. At a public meeting, the Commission modified the boundary in an area south of Tucson to avoid splitting a neighborhood. Instead, Dr. Hofeller's map divides this area. (12/19/11 Tr. at 86:16-91:5.)

24. Dr. Hoffeler's map keeps the Town of Gilbert entirely within LD 12, which is consistent with public testimony from Gilbert. (10/18/11 Tr. At 45:2-47:7.) But he omits the Town of Queen Creek, which favored being included in LD 12. (10/18/11 Tr. at 22:19-23:20.) His map of LD 12 also modifies LD 17, which the City of Chandler supported as configured by the AIRC. (10/18/11 Tr. at 19:4-20:16 19:4; 10/8/11 Tr. at 168:4-178:23.)

25. Dr. Hofeller's alternative map splits 14 fewer census places (which include cities and towns) than the Commission's map (453 compared to 439), but splits 62 more census tracts than the Commission (1,219 compared to 1,281). Once again, there is a trade-off in goals. The Arizona Constitution directs the use of city, town and county boundaries *and undivided census tracts* to the extent practicable. Dr. Hofeller favored city and town boundaries, but chose to divide more census tracts than the Commission's map.

26. In short, there are numerous instances in which Dr. Hofeller's map contradicts policy choices that the Commission made after extensive public scrutiny and debate. Redistricting is inevitably about trade-offs. Putting more emphasis on tight population variances inevitably puts more constraint on the ability to satisfy other criteria such as preserving communities of interest or creating majority minority ability-to-elect districts. Plan X prioritizes the preferences of a single mapmaker over public testimony and the deliberations of the AIRC.

27. To conclude, there is no basis in evidence for Dr. Hofeller's allegation that the districts were deliberately under-populated to advantage Democratic candidates. Even he concedes that the correlation with minority percentages is stronger than with party. The fact that there is any relation to party at all is because the ability-to-elect districts lean towards the Democratic party and the Republican seats are predominantly non-Hispanic white. As is abundantly clear from the public record, the AIRC's population deviations resulted from a deliberate strategy to avoid the mistakes of the past and achieve preclearance. Dr. Hofeller cites the California Citizen Redistricting Commission's lower population deviations, but fails to acknowledge that California is not a Section 5 state. Data from the NCSL reveal that the other Section 5 states also used their allowed discretion in population deviations. The AIRC's plan successfully passed preclearance. Dr. Hofeller's Plan X achieves near perfect populations but at the expense of Section 5 goals. His plan in my opinion would have been an imprudent choice and may not have received preclearance.

Dated this 13th day of February, 2013.

/s/_____
Bruce E. Cain

APPENDIX F — PLAINTIFF'S SECOND AMENDED COMPLAINT IN THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA, FILED NOVEMBER 16, 2012

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Case No. CV 12-0894-PHX-ROS

WESLEY W. HARRIS, *et al.*,

Plaintiffs,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Defendants.

PLAINTIFF'S SECOND AMENDED COMPLAINT

For their first amended complaint, Plaintiffs Wesley W. Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Ted Carpenter, Beth K. Hallgren, James C. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, Karen M. MacKean, and Sherese L. Steffens, allege as follows:

OVERVIEW

1. By any objective standard, the work of the majority on the Arizona Independent Redistricting Commission ("IRC") has been a failure. It drew fewer

competitive districts than the number drawn in 2002. It designed bizarre-shaped districts, glaring examples being Legislative District 6, which cobbles together parts of Coconino, Yavapai, Gila, and Navajo Counties, and Congressional District 4, which stretches from Bullhead City to Florence to Yuma. It violated section 2 of the Voting Rights Act by depriving minorities of the number of legislative districts the Act required for them. It systematically overpopulated Republican-plurality districts and under-populated Democrat-plurality, the obvious goal being to maximize the number of Democratic districts. It packed Republican incumbents into districts to force them to run against each other. The selection of the putatively independent chairperson was marred by material omissions from her application and from her interview. Had the chairperson disclosed her connections to the Democratic Party, she never would have been selected as chairperson. The IRC unfortunately quickly polarized around party lines, with the nominally independent chairperson siding with the two Democrats on every substantive issue, including the selection of a partisan Democratic firm as mapping consultant. The IRC's work was late, and it wasted public money. When the voters passed Proposition 106 in 2000 to create the IRC, they wanted to take politics out of redistricting. This IRC put politics front and center – specifically to favor Democrats. In doing so, as described below, it violated the one-person/one-vote requirement of the equal protection clause of the Fourteenth Amendment to the United States Constitution, *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004), *aff'd sub nom. Cox v. Larios*, 542 U.S. 947 (2004), and the equal population requirement of ARIZ. CONST. art 4, pt. 2, §1(14)(B).

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NATURE OF THE ACTION

2. This action is brought by Plaintiff Arizona qualified electors to challenge the final map of Arizona legislative districts ("Final Legislative Map") approved by the IRC on or about January 17, 2012, on the grounds that the legislative districts created by the IRC violate the one-person/one-vote requirement of the equal protection clause of the Fourteenth Amendment to the United States Constitution, and violate the equal population requirement of ARIZ. CONST. art 4, pt. 2, § 1(14)(B), by systematically overpopulating Republican plurality districts and systematically under-populating Democrat plurality districts with no lawful state interest justifying such deviations from equality of population among Arizona legislative districts.

PARTIES, JURISDICTION, AND VENUE

3. Plaintiffs are all qualified electors of the State of Arizona, registered to vote in Arizona, and members of the Republican Party. The addresses at which they are registered to vote in Arizona and the legislative districts in which they reside are as follows: Wesley W. Harris, 14802 N. Coral Gables Drive, Phoenix 85023, Legislative District 20; LaMont E. Andrews, 3366 E. Cardinal Way, Chandler 85286 Legislative District 17; Cynthia L. Biggs, 10612 S. Greenfield Rd., Gilbert 85234, Legislative District 12; Lynne F. Breyer, 7629 N. Via del Paraiso, Scottsdale 85258, Legislative District 23; Ted Carpenter, 9727 E. Twin Spurs, Florence 85132, Legislative District 8; Beth K. Hallgren, 3400 S. Ironwood Drive, Lot 236,

Apache Junction 85120, Legislative District 16; James C. Hallgren, 3400 S. Ironwood Drive, Lot 236, Apache Junction 85120, Legislative District 16; Lina Hatch, 1325 W. Pebble Court, Gilbert 85233, Legislative District 17; Terry L. Hill, 2677 Arizona Highway 77, Show Low 85901, Legislative District 6; Joyce M. Hill, 2677 Arizona Highway 77, Show Low 85901, Legislative District 6; Karen M. MacKean, 4422 Larkspur Road, Show Low 85901, Legislative District 6; and Sherese L. Steffens, 5869 W. Oasis Road, Tucson 85742, Legislative District 11.

4. All Plaintiffs reside in an overpopulated legislative district, and the resulting violations of the one-person/one-vote requirement of the equal protection clause of the Fourteenth Amendment to the United States Constitution, and the equal population requirement of ARIZ. CONST. art 4, pt. 2, §1(14)(B), as alleged in detail below, have proximately caused Plaintiffs and each of them to suffer concrete and particular injuries, *i.e.* the unconstitutional dilution of their votes, for which this Court is able to provide relief.

5. Defendant IRC is a commission established by ARIZ. CONST. art 4, pt. 2, § 1(3), "to provide for the redistricting of congressional and state legislative districts." The IRC can sue and be sued under ARIZ. CONST. art 4, pt. 2, § 1 in "legal actions regarding [its] redistricting plan."

6. Defendants Colleen Mathis, Linda C. McNulty, José M. Herrera, Scott D. Freeman, and Richard Stertz

currently hold office as members of the IRC, did so at all times material to this action, and are named herein as defendants solely in their official capacities. All of these defendants reside within the District of Arizona.

7. Defendant Ken Bennett currently holds office as Arizona Secretary of State, and is charged with certain official duties with respect to the conduct of elections to the Arizona Legislature. Defendant Bennett is named herein solely in his official capacity and as a nominal party in view of his election responsibilities.

8. This court has jurisdiction of this action under 28 U.S.C. §§ 1331, 1367, 2201, 2202, 2284, and 42 U.S.C. § 1983.

9. Venue is proper in the District of Arizona under 28 U.S.C. § 1391.

10. Because this is an action challenging the apportionment of the Arizona Legislature, a three-judge court has been convened pursuant to 28 U.S.C. § 2284 to try this action and to conduct all other proceedings as required by law.

ESTABLISHMENT OF THE IRC

11. On or about December 29, 2010, acting pursuant to authority granted by ARIZ. CONST. art 4, pt. 2, § 1(5), the Arizona Commission on Appellate Court Appointments ("Appointment Commission") nominated the requisite number of nominees to be considered for appointment

to the IRC. Specifically, the Appointment Commission finalized a pool of 25 candidates for appointment to the IRC: ten each from the Democratic and Republican Parties, and five who were not registered with either of those parties.

12. A question quickly arose whether three of the individuals nominated by the Appointment Commission qualified for a seat on the IRC under the requirements of ARIZ. CONST. art. 4, pt. 2, § 1(3).

13. To challenge the qualifications of these three nominees, an action was filed in the Arizona Supreme Court under the caption of *Adams v. The Commission on Appellate Court Appointments*, No. CV 10-0405-SA.

14. On January 19, 2011, the Arizona Supreme Court issued an order in this case, found therein that two of the three nominees in question failed to satisfy the constitutional requirements to serve as a member of the IRC, and directed that they be replaced. The opinion supporting the order is published at 227 Ariz. 128, 254 P.3d 367 (2011).

15. Pursuant to the Arizona Supreme Court's order, the Appointments Commission convened and nominated two additional nominees, one of whom was Mr. Stertz.

16. On or about the following dates, appointments to the IRC were made in the constitutionally prescribed order: January 31, 2011, the Republican Speaker of the Arizona House of Representatives appointed Defendant

Freeman, a registered Republican from Maricopa County; February 2, 2011, the Democratic Minority Leader of the Arizona House of Representatives appointed Defendant Herrera, a registered Democrat from Maricopa County; February 9, 2011, the Republican President of the Arizona State Senate appointed Defendant Stertz, a registered Republican from Pima County; and February 15, 2011, the Democratic Minority Leader of the Arizona State Senate appointed Defendant McNulty, a registered Democrat from Pima County.

SELECTION OF THE CHAIRPERSON AND HER MATERIAL OMISSIONS

17. In response to the rules or practices of the Appointment Commission, Defendant Mathis, a registered Independent from Pima County, submitted an application to the Appointment Commission, dated October 12, 2010. A true copy of the application is attached as Exhibit 1, and is adopted herein by reference. Therein Defendant Mathis omitted critical information, which, had it been known, would have identified her as biased to the Democratic Party and not impartial, and would have precluded her under ARIZ. CONST. art 4, pt. 2, § 1(3), from being nominated to the IRC as an Independent or and from being selected to serve as the Independent chairperson of the IRC.

18. Specifically, she failed to reveal (a) that Christopher Mathis, Defendant Mathis's husband, served in the 2010 election as treasurer for the campaign of Nancy Young Wright, a Democratic candidate for a seat in the Arizona House of Representatives from legislative

district 26 in Pima County, (b) on May 16, 2010, she donated $100 to the campaign of Andrei Cherny, then a candidate for Arizona State Treasurer in the 2010 election, (c) on May 4, 2010, Christopher Mathis donated $250 to the Cherny state-treasurer campaign, (d) on October 27, 2010, Christopher Mathis donated $100 to the Nancy Wright legislative campaign, (e) on August 10, 2010, she donated $10 to the Arizona List P.A.C., a committee for pro-choice democratic women in Arizona; and (f) on March 3, 2010, Christopher Mathis donated $75 to Arizona List P.A.C., and on August 10, 2010, donated another $10 to Arizona List P.A.C. A true copy of a campaign finance report of the Arizona Secretary of State's office reflecting such donations is attached as Exhibit 2, and is adopted herein by reference. This consistent pattern of service to Democratic causes and donations to Democratic candidates reveals that Defendant Mathis at heart was a Democrat, though dressed in Independent clothing.

19. Question number 6 on the application provides: "Is there any possible conflict of interest or other matter that would create problems or prevent you from fairly and impartially discharging your duties as an appointee to the Independent Redistricting Commission? Yes ( ) No ( ) If your answer is "Yes," attach an explanation. Defendant Mathis answered "No." Defendant Mathis did not disclose the information relative to her Democratic-Party ties on her application in response to this question.

20. On February 24, 2011, in a meeting called by the Arizona Secretary of State, the first four appointed Commissioners, constituting a quorum, met to select a

chairperson from among the five candidates who are not registered with either of Arizona's two largest parties.

21. During the February 24, 2011, interviews, Defendant Freeman indicated to Defendant Mathis that the IRC's political appointee members were looking for a chairperson who would bring balance and fairness to the IRC and asked Defendant Mathis whether anything in her background would call into question her ability to be fair. According to the minutes of this meeting, Defendant Mathis answered that "there is nothing in her background that would limit her ability to be fair and as long as she did not have to make decisions about buying heavy equipment she would be okay." In response to questioning from Defendant McNulty about her management style, the meeting minutes report that Defendant Mathis responded that she liked "to create an environment where people feel they can trust her and are comfortable with what she is trying to do" and that it was "important to be open and impartial and achieve the end result by consensus."

22. This was an opportunity for Defendant Mathis to correct the material omissions she had made on her application. Instead, as disclosed by her interview answers, she doubled down and continued to maintain a facade of impartiality.

23. Although they interviewed the five candidates and then met in closed session, the Commissioners did not select a chairperson that day. To allow time for further reflection, the Commissioners decided to meet again on March 1, 2011.

24. On March 1, 2011, after meeting in closed session for a little over an hour, Defendants Freeman, Herrera, Stertz, and McNulty selected Defendant Mathis to serve as IRC Chair.

25. Indeed, Mr. Mathis effectively became a "sixth commissioner" by closely counseling Defendant Mathis on every aspect of the redistricting process and the votes that were taken and interacting with stakeholders. Mr. Mathis attended virtually every public meeting of the IRC, often spoke with Democratic operatives during hearings, listened in on many conference calls among the IRC members, and acted on Defendant Mathis's behalf to round up votes on decisions coming before the IRC. Mr. Mathis even went so far as to propose a deal to establish legislative district boundaries under which the Democratic Commissioners would draw districts in southern Arizona and the Republican Commissioners would draw those in northern Arizona.

26. For someone constitutionally barred from service on the Commission, Mr. Mathis was allowed to have unprecedented involvement in and influence on the redistricting process.

TURMOIL SURROUNDS THE IRC'S PARTISAN DECISIONS

27. With the selection of Defendant Mathis as its chair, the IRC was fully constituted on March 1, 2011, and it almost immediately violated the Arizona Constitution. 9. After selecting a chair, Article 4, Part 2,

§ 1(9) of the Arizona Constitution mandates that "[t]he five commissioners shall then select by majority vote one of their members to serve as vice-chair."

28. But instead of complying with the constitution's mandate and despite the advice of counsel to the contrary, the IRC selected both Commissioners Herrera and Freeman to serve as co-vice-chairs.

29. After the appointment of the IRC's chairperson, the commissioners quickly polarized along party lines, with the chairperson, nominally an independent, siding with the Democratic members on every decision of any consequence.

THE DEMOCRATS AND INDEPENDENT SELECT REPUBLICAN COUNSEL

30. The alliance among Defendants Mathis, McNulty and Herrera first emerged with the selection of the IRC's legal counsel.

31. After discussion about the IRC's procurement authority and consultation with the State Procurement Office ("SPO") of the Arizona Department of Administration, the IRC Defendants decided to follow the state procurement code to retain legal services from one or more law firms.

32. On or about April 8, 2011, SPO issued a request for proposals ("RFP") for IRC legal services. Responses to the legal services RFP were due April 28, 2011.

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33. ARIZ. CONST. art. 4, pt. 2, § 1(12) does not authorize the IRC to meet in anything but "a meeting open to the public, with 48 or more hours public notice provided." Nonetheless, the IRC met in closed sessions on May 3, 2011, for approximately 5.5 hours; May 6, 2011 (telephonically) for an undisclosed amount of time; and on May 10, 2011 for approximately 1.5 hours before selecting the law firms to be interviewed in public session on May 10, 2011.

34. On May 12, 2011, the IRC met in public session and interviewed six of the law firms that responded to the legal services RFP with the goal of procuring the services of a Republican and a Democratic attorney.

35. After at least two closed sessions on May 12, 2011, and May 13, 2011, totaling approximately two hours, Defendants Mathis, McNulty, and Herrera selected Osborn Maledon, P.A. (Democrat Mary O'Grady) and Ballard Spahr LLP (Republican Joseph Kanefield) as legal counsel. For more than 20 years, Mr. Kanefield had been a registered Democrat, and only switched to the Republican Party in 2010.

36. The Democratic Commissioners, Defendants McNulty and Herrera, and the Chairperson, Defendant Mathis, selected Republican counsel over the objections of the Republican Commissioners, Defendants Freeman and Stertz.

37. The selection of Republican counsel against the wishes of the Republican members of the IRC set

off a firestorm of controversy during public comment in subsequent meeting after meeting. In summary, this first glimpse of the coalition of Defendants Mathis, McNulty, and Herrera raised concerns that the selection of counsel would foreshadow this coalition's commitment to something other than the application of the constitutional provisions in an honest, independent, and impartial fashion and other than upholding public confidence in the integrity of the redistricting process.

THE DEMOCRATS AND INDEPENDENT SELECT A HIGHLY-PARTISAN DEMOCRATIC FIRM AS MAPPING CONSULTANT

38. Further concerns emerged concerning the outcome-oriented nature of the scoring of the responses to the RFP engaged in by at least one Commissioner who gave

* * *

39. Upon information and belief, Defendants Mathis, McNulty, and Herrera discussed matters involving the selection of legal counsel for the IRC, including having discussions that led to or were the equivalent of legal action, outside of properly noticed public meetings.

40. On or about June 15, 2011, the IRC Defendants met in public session to select four candidates to interview for the position of mapping consultant: Strategic Telemetry, National Demographics, Research Advisory Services, and Terra Systems Southwest. Before making their selection,

the IRC Defendants held one or more closed sessions to discuss the selection of a mapping consultant, including an almost five-hour closed session on June 15, 2011.

41. Following presentations by the candidates for mapping consultant on June 24, 2011, the IRC Defendants met in closed session to discuss the selection of the mapping consultant, and Defendants Mathis, McNulty, and Herrera all gave Strategic Telemetry perfect scores despite its complete lack of redistricting experience, its lack of even rudimentary knowledge of Arizona demographics and geographics, its submission of the most expensive proposal, and its being headquartered at the District of Columbia.

42. A copy of the July 1, 2011, Yellow Sheet Report, published by Arizona Capitol Reports, LLC, is attached as Exhibit 3 and is adopted herein by reference, and details the irregularities surrounding the selection of Strategic Telemetry as mapping consultant to the IRC. These irregularities were not limited to closed-session violations of Ariz. Const. art. 4, pt. 2, § 1(12), but also included destruction of public records, *i.e.* their initial scoring sheets, in violation of A.R.S. § 39-121.01.

43. Throughout this selection process, concerns were voiced about Strategic Telemetry's highly partisan, pro-Democratic resume. Strategic Telemetry advertised itself as a statistics and data analysis firm that caters to Democratic clients. Upon information and belief, as a Democratic campaign strategist, Strategic Telemetry's President, Ken Strasma, specialized in micro targeting

and is considered to be a pioneer in the use of high-tech statistical modeling in Democratic campaigns. In this vein, Mr. Strasma, served as the national target director for the 2008 Obama presidential campaign. His work for the 2008 Obama campaign included micro-targeting, a technique for identifying narrow niches of voters and targeting campaign communications to them. He also worked with the 2004 John Kerry presidential campaign. Most recently, he worked on efforts to recall Republican officials in Wisconsin, including Governor Scott Walker. Mr. Strasma also has a long history of making substantial monetary contributions to Democratic candidates. According to Federal Election Commission records, Mr. Strasma has contributed almost $15,000 to Democratic candidates in recent years. The fact that Strategic Telemetry is not a mapping firm was highlighted during and AIRC meeting in July 2011 when Strategic Telemetry indicated that its staff would need time to learn the software that is standard in the mapping industry.

THE DEMOCRATS AND INDEPENDENT DEFY THE OPEN MEETING LAW

44. Despite its lack of mapping experience, Strategic Telemetry's ability to go beyond voter registration to analyze voter behavior would allow it to carve out districts that might appear neutral but in fact would be solidly pro-Democrat districts. Commissioner Mathis lobbied other Commissioners to select Strategic Telemetry.

45. Before the selection of the mapping consultant, Defendant Mathis contacted Defendant Freeman on at

least one occasion to ask him to support the selection of Strategic Telemetry as the IRC's mapping consultant. Defendant Mathis presented a *quid pro quo* to Defendant Freeman, stating that "there might be times in the future where, you know, [you] need[] a third vote." (Attorney General Deposition of S. Freeman at 11:8-9, copy attached as Exhibit 4 and adopted herein by reference.) Defendant Freeman properly rejected Defendant Mathis's overture.

46. Before the selection of the mapping consultant, Defendant Mathis contacted Defendant Stertz on at least two occasions to ask him to support the selection of Strategic Telemetry as the IRC's mapping consultant. Defendant Mathis presented a *quid pro quo* to Defendant Stertz, stating that "if I were to vote with her in regards to the selection of Strategic Telemetry, she would provide a favorable vote for me in the future." (*See* 10/29/2011 Letter of R. Stertz to Governor Brewer at 2, a true copy of which is attached as Exhibit 5 and is adopted herein by reference.) Like Defendant Freeman, Defendant Stertz properly rejected Defendant Mathis's offer to exchange his vote in favor of Strategic Telemetry for the promise of a future vote from Defendant Mathis.

47. Before the selection of the mapping consultant, Defendant Herrera communicated with one or more other IRC Commissioners regarding which firm should be hired. According to remarks made during the June 29, 2011 public meeting, Mr. Herrera pretextually stated that his first choice was Research Advisory Services but further stated that "in a spirit of cooperation and negotiation," he decided "to support Strategic Telemetry."

48. Upon information and belief, before the selection of the mapping consultant, Defendant Mathis contacted Defendant McNulty on at least one occasion to ask her to support the selection of Strategic Telemetry as the IRC's mapping consultant.

49. On June 29, 2011, the IRC Defendants met to consider the mapping consultant RFP. Following a closed session with State Procurement officials, the IRC's counsel announced that SPO was no longer working on the mapping consultant procurement and that the project was now delegated to the IRC. Upon information and belief, SPO renounced any role in the process because the process clearly was diverging from long-standing principles of Arizona procurement law.

50. The IRC then proceeded to select Strategic Telemetry as its mapping consultant by a vote of 3-2, with the Mathis-McNulty-Herrera coalition voting yes, and Defendants Stertz and Freeman voting no.

51. In explaining her vote for Strategic Telemetry, Defendant Mathis read from remarks obviously prepared in advance of the meeting, which indicated advance knowledge of the outcome of the IRC's vote.

52. On information and belief, Defendants Mathis, McNulty, and Herrera coordinated their efforts to guarantee that Strategic Telemetry would be selected as the IRC's mapping consultant by, among other actions, agreeing that they each would award Strategic Telemetry a perfect score and engaging in various non-

public communications designed to garner a majority of Commissioners in advance of a public meeting. These *sub rosa* efforts to achieve majority consensus violated ARIZ. CONST. art. 4, pt. 2, § 1(12), which required all discussions and actions to hire a mapping consultant to occur in a public meeting. "Public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions with a majority of the public body members. Splintering the quorum can be done by meeting in person, by telephone, electronically, or through other means to discuss a topic that is or may be presented to the public body for a decision." Arizona Attorney General Agency Handbook at § 7.5.2, found at http://www.ag.state.az.us/Agency_Handbook/ch07.pdf.

53. Coming on the heels of the selection of legal counsel, the Mathis-McNulty-Herrera decision to hire the highly partisan Strategic Telemetry proved to be a flashpoint that irreparably damaged public confidence in the IRC. Subsequent IRC meetings featured scores of citizens expressing concerns about the ability of Strategic Telemetry to remain impartial. The transcript of the IRC's public meeting on June 30, 2011, reflects roughly 90 pages of public comments denouncing the selection of Strategic Telemetry and the criticizing the hack conduct of Defendant Mathis.

54. Additional concerns were raised about Defendants Mathis, McNulty, and Herrera discussing IRC business with each other outside of public meetings and about the IRC improperly conducting business during closed sessions.

55. On the morning of July 21, 2011, Attorney General Tom Horne announced an investigation of the IRC for alleged violations of Arizona's procurement rules and its open meeting law, which is codified at A.R.S. §§ 38-431.01 through 38-431.09.

56. As part of this investigation, the Attorney General issued Civil Investigative Demands ("CIDs") to all five Commissioners.

57. Commissioners Freeman and Stertz cooperated with the Attorney General's investigation and submitted to depositions under oath.

58. Defendants Mathis, McNulty, and Herrera each received separate legal counsel at the IRC's expense, which violated A.R.S. § 38-431.07(B), and each refused to cooperate with the Attorney General's investigation. The Attorney General sued these Commissioners in Maricopa County Superior Court to enforce the CIDs, Case no. CV2011-016442.

59. In response to the Attorney General's investigation, the IRC argued that it was subject only to ARIZ. CONST. art. 4, pt. 2, § 1(12)'s public meeting requirement and not the specific provisions of the open meeting law. But the Defendant IRC's own counsel provided training to the Commissioners on open meeting law compliance, noticed IRC meetings by citing to the open meeting law's provisions, and freely utilized the open meeting law's exception allowing the IRC to meet in closed sessions. What's more, if the IRC were only

subject to ARIZ. CONST. art. 4, pt. 2, § 1(12)'s public meeting requirements, it had no legal justification for the more than 40 hours spent in closed sessions.

60. The IRC brought a declaratory judgment and special action, case no. CV2011-017914, seeking in Maricopa County Superior Court to resolve the question of whether the IRC was subject to the open meeting law and to protect the IRC from what it argued was the Attorney General's attempt to interfere with the IRC's business.

61. The trial court ultimately removed the Attorney General from the investigation based on a conflict of interest arising from the Attorney General's representation of the IRC before the hiring of the IRC's legal counsel. The investigation was then transferred to the Maricopa County Attorney's Office. The trial court also determined that (a) the IRC is subject only to ARIZ. CONST. art. 4, pt. 2, § 1(12)'s public meeting requirement, and (b) that the IRC is not subject to the open meeting law. The Maricopa County Attorney's Office has appealed, and the matter is now pending in Division One of the Arizona Court of Appeals, No. 1 CA-CV 12-0068.

62. On information and belief, Defendants Mathis, McNulty and Herrera engaged in non-public communications to arrive at consensus among this majority of Commissioners and then took the position that they were not subject to Arizona's open meeting law in order to avoid the consequences of their conduct.

63. Early on, the stage thus was set for an outcome-driven redistricting instead of the process-driven redistricting guaranteed by the Arizona Constitution.

THE DEMOCRATS AND INDEPENDENT ABANDON THE CONSTITUTIONAL PROCESS

64. ARIZ. CONST. art. 4, pt. 2, §§ 1(14) – (16) require the IRC to perform its district-drawing work in four phases. *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*, 220 Ariz. 587, 597, ¶ 29, 208 P.3d 676, 686 (2009).

65. The first phase is the "creation of districts of equal population in a grid-like pattern across the state." *Id.* at ¶ 30 (internal quotation marks omitted.)

66. Second, the "Commission must make adjustments to the grid as necessary to accommodate the six constitutional goals." *Id.* at ¶ 31 (internal quotation marks omitted.)

67. Third, the IRC must advertise the maps for public comment for a period of 30 days. *Id.* at 598-99, ¶ 31, 208 P.3d at 687-88.

68. Fourth, "after the public comment period has ended, the Commission must establish final district boundaries and certify the new districts to the Secretary of State." *Id.* at 600, ¶ 44, 208 P.3d at 689.

69. On or about July 21, 2011, the IRC began to hold what it denoted as round-one public hearings in various locales around Arizona to take public input on mapping considerations.

70. The IRC concluded the round-one public hearings on or about August 6, 2011.

71. On August 18, 2011, the IRC considered two possible congressional grid maps and chose Grid Map No. 2. Although the constitution requires that the IRC begin the mapping process by creating "districts of equal population in a grid-like pattern across the state" before making any adjustments to accommodate the six constitutional goals, the IRC violated the constitution by considering factors other than equal population in creating the Congressional Grid Map. A true copy of the congressional grid map is attached as Exhibit 6, and is adopted herein by reference.

72. As reflected in the transcript of the IRC meeting of August 18, 2011, at 5:24-6:2, the IRC's adopted Congressional Grid Map was based not only on equal

* * *

73. In addition, instead of adopting a Grid Map that would serve as a neutral, unbiased starting point for redistricting, the IRC's Congressional Grid Map was adopted based on subjective considerations, including which Grid Map might be most likely to lead to a Commissioner's desired outcome in violation of ARIZ. CONST. art. 4, pt. 2 § 1(14). *See* Exhibit 7 at 6:24-51:19.

74. On August 18, 2011, the IRC approved its option 2 legislative grid map, thereby completing Phase 1 of its constitutionally-mandated work. A true copy of this grid map is attached as Exhibit 8, and is adopted herein by reference.

75. After approval of the grid maps, the IRC entered into Phase 2 of its constitutionally-mandated work, and began adjustments to the grid maps.

PHASE TWO MAP DRAWING, CONTINUED POLARIZATION, BOGGING DOWN, AND PARTIAL ABANDONMENT OF THE GRID MAP

76. The IRC again polarized around party lines, with the Democratic members proposing a series of legislative mapping iterations under the label of Legislative 9 Minority Districts Option 1, and the Republican members proposing a series of legislative mapping iterations under the label of Legislative 9 Minority Districts Option 2.

77. Similarly, on the congressional side, the Democratic members proposed a series of congressional mapping iterations under the rubric of River District, and the Republican members proposed a series of congressional mapping iterations under the rubric of Whole Counties.

78. In September 2011, the IRC began bogging down in its work on both the legislative and congressional sides.

79. As a result, on the week-end of September 24-25, 2011, Chairperson Mathis on her own at her home began to draw a congressional map, which she presented to the IRC at its meeting of September 26, 2011, under the label of the "Everything Map," the effect of which was to merge the River District Map and the Whole Counties Map outside of Maricopa County and to obliterate the grid map and leave a blank space in Maricopa County. This Map quickly became known as the donut-hole map.

80. The Chairperson then turned the task of filling in the blank space in Maricopa County to Commissioner McNulty.

81. It was apparent from this process that Ms. Mathis had (1) again sided with the Democratic members on the question of drawing the congressional map, and (2) in Maricopa County had forsaken the state constitutional command that the IRC begin with the grid map and make adjustments only for the six goals set forth in ARIZ. CONST. art. 4, pt. 2, § 1(14).

82. Abandoning the grid map in Maricopa County and turning the congressional map drawing within Maricopa County over to Commissioner McNulty brought a firestorm of public criticism down upon the chairperson.

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ADOPTION OF DRAFT MAPS WITH NO GENUINE EFFORT TO SATISFY THE VOTING RIGHTS ACT

83. On October 3, 2011, a three–person majority of the IRC, composed of Chairperson Mathis and Democratic members McNulty and Herrera, approved a congressional draft map to be published for 30-day comment.

84. The IRC then turned to the legislative maps. To defuse the criticism of partisanship surrounding her obliteration of the grid map in Maricopa County on the congressional side and turn over of the line drawing in Maricopa County to Commissioner McNulty, Chairperson Mathis initially drew Commissioner Freeman in to join Commissioner McNulty in drawing legislative districts.

85. On October 10, 2011, the IRC approved a draft legislative map, a true copy of which is attached as Exhibit 9 and is adopted herein by reference.

86. A racial bloc voting analysis is an essential and critical element to satisfying the requirements of sections 2 and 5 of the Voting Rights Act. Without a racial bloc voting analysis it is impossible to know whether any redistricting plan complies with the Voting Rights Act.

87. By the time the IRC had approved its draft legislative map, it had not conducted a racial bloc voting analysis of either the congressional or the legislative map.

88. As a result, the IRC's purported effort to comply with the Voting Rights Act was incomplete, and its implicit representation to the public that its draft legislative map complied with the Voting Rights Act was fraudulent by material omission.

89. What's more, by the time the IRC had approved its draft legislative map, it had not obtained all of its data on the competitiveness goal, and thus could not have determined whether either the congressional or legislative maps satisfied the competitiveness criterion of ARIZ. CONST. art. 4, pt. 2, § 1(14)(F).

90. As a result, the IRC also failed to afford the Legislature a genuine 30-day comment period, as required by ARIZ. CONST. art. 4, pt. 2, § 1 (16).

ROUND TWO HEARINGS AND COMMENT FROM THE LEGISLATURE

91. Beginning on October 11, 2011, the IRC commenced a series of public hearings on the draft maps, and such hearings continued until November 5, 2011.

92. Acting pursuant to the authority conferred on it by ARIZ. CONST. art. 4, pt. 2, § 1(16), on November 1, 2011, the Arizona Legislature approved House Concurrent Memorial 2001 (50th Leg. 4th Sp. Sess.) to the IRC commenting on the draft maps and cautioning the IRC that, among other things, (a) the draft legislative map likely would violate the one-person/one-vote rule of the Fourteenth Amendment and the equal population

requirement of ARIZ. CONST. art. 4, pt. 2, § 1(14)(B), (b) the IRC had not performed a racial bloc voting analysis and therefore could not have made any genuine determination that the legislative draft map complied with the Voting Rights Act, (c) the minority voting-age population in some districts exceeded 60%, while in adjacent districts barely exceeded 50%, (d) the draft legislative districts failed to respect communities of interest in at least 13 instances, and failed to respect city, town, and county lines in multiple instances, (e) it appeared from the packing of Republican incumbents into several districts that the IRC had to have considered the residence locations of incumbents, which violated ARIZ. CONST. art. 4, pt. 2, § 1(15), and (f) the IRC had not complied with the 30-day comment requirement of ARIZ. CONST. art. 4, pt. 2, § 1(16), because the IRC had neither the essential racial bloc voting analysis nor complete competitiveness information when it approved the draft maps and therefore the maps were incomplete when published to the public. A true copy of the Legislature's memorial is attached as Exhibit 10, and is adopted herein by reference.

THE GOVERNOR'S REMOVAL OF THE CHAIRPERSON

93. Concerned about the IRC's patent violation of the map-drawing process provided by ARIZ. CONST. art. 4, pt. 2, §§ 1(14) — (16), the Governor gave notice to the IRC chairperson and members of such violations, and requested a response by October 31, 2011. A true copy of the Governor's notice letter is attached as Exhibit 11, and is adopted herein by reference.

94. Finding the response of the Chairperson inadequate, on November 1, 2011, the Governor announced her intent to remove Chairperson Mathis, and called a special session of the Arizona Legislature for the purpose of obtaining concurrence from the Arizona Senate.

95. On November 1, 2011, the Arizona Senate concurred with the Governor's removal of the Chairperson by a two-thirds majority.

96. The IRC filed a special action petition in the Arizona Supreme Court to reverse the Governor's removal of Chairperson Mathis, the Arizona Supreme Court accepted jurisdiction, and by order dated November 17, 2011, the Arizona Supreme Court reversed the removal and ordered Chairperson Mathis reinstated to her office at the IRC. The opinion supporting the order is *Arizona Independent Redistricting Com'n v. Brewer*, —- P.3d ——, 2012 WL 1366362, 632 Ariz. Adv. Rep. 32 (Ariz., April 20, 2012).

ALL PRETENSE OF IMPARTIALITY IS ABANDONED.

97. With her hand strengthened by the Arizona Supreme Court's reversal of her removal, Chairperson Mathis and the two Democratic members of the IRC abandoned all pretense of impartiality and proceeded to maximize the advantages in the legislative map to the Democratic Party.

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98. The IRC gave no consideration to the recommendations of the Legislature in violation of the Article 4, Part 2, § 1(16) of the Arizona Constitution.

99. The Legislative recommendations were placed on the Commission's November 29, 2011 agenda. At that meeting, Commission attorney Mary O'Grady advised the Commissioners that the Legislative recommendations were in the packet of materials provided to each Commissioner for their review. Ms. O'Grady stated, "I don't know that it makes sense now to sort of read through [the Legislature's recommendations], but maybe commit it to the Commission to makes [sic] sure that you review those. And as the mapping process proceeds, you may want to – you can take those into account as the work goes on." She also stated that the Commission "might want to consider" the Legislature's comments and that "if the Commission is concerned about anything [raised by the Legislature], they can consider those as they propose recommended changes to the draft map." (Tr. 11-29-11 at 144:18-146:22).

100. Defendant Herrera stated his understanding of Ms. O'Grady's advice. "I think as Ms. O'Grady said, we're free to read this information and take it into account when we are making changes to the draft map. So I think she was pretty clear." Tr. 11-29-11 at 148:12-15.

101. The Commission merely made a record that it had received House Concurrent Memorial 2001, which is insufficient to satisfy the constitutional requirement that the Commission "consider" the recommendations of the Legislature. Tr. 11-29-11 at 145:9-16.

102. The Commission treated its responsibility to consider the Legislative recommendations as discretionary in violation of Ariz. Const. art. 4, pt. 2, § 1(16).

103. At no time did a quorum of the Commission consider acting upon the Legislature's recommendations, in whole or in part, and never considered accepting or rejecting any or all of its recommendations. On information and belief, the Commission ignored the Legislature's recommendations and, by doing so, ignored the constitutional requirement that it consider them.

104. In a series of IRC meetings beginning on November 29, 2011, and ending on January 17, 2012, the IRC's Democrat-polarized majority made numerous changes in the draft legislative map, which can be summarized as follows:

District	Changes
1	Lost Camp Verde, and added New River, Cave Creek, Carefree, and Anthem
2	Lost Cochise County, and added Green Valley and more of Tucson
3	Added part of Marana and Democratic State Senator Cajero Bedford's house
4	Lost part of Yuma to Legislative District 13
5	Added the Arizona strip north of the Grand Canyon
6	Added Camp Verde and Grand Canyon Village, and lost Show Low and Linden

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7	Lost the Arizona Strip and added Show Low and Linden
8	Lost east Tucson foothills and Saddlebrook, and added Eloy and part of Casa Grande
10	Added southeastern Tucson
11	Lost Eloy, Casa Grande, and the Gila River reservation, and added the east Tucson Foothills
12	Added Queen Creek in Pinal County
13	Added northwest Maricopa County, including Buckeye and Wickenburg, and part of Yuma, and lost part of Surprise
14	Added Greenlee County and a portion of Cochise County, and lost part of Tucson
15	Added Phoenix west of I-17, and Lost Phoenix south of Union Hills
20	Added eastern Glendale
21	Added a portion of Surprise
23	Gained the Ft. McDowell Reservation
24	Lost northeastern Scottsdale and the Salt River Reservation
26	Gained northeastern Scottsdale and the Salt River Reservation
27	Gained the Gila River Reservation

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ADOPTION OF THE FINAL LEGISLATIVE MAP

105. On January 17, 2012, the IRC Democratic-polarized majority approved a final legislative map over the vigorous dissents of the two Republican members.

106. As reflected in the comments of Vice-Chairperson Freeman and Commissioner Stertz at the IRC meeting of January 17, 2012, the final map was stripped of all input from the Republican members and was a purely Democratic map with only pretextual effort to satisfy the six state-constitutional goals set forth in ARIZ. CONST. art. 4, pt. 2, § 1(14).

THE IRC SYSTEMATIC OVERPOPULATES REPUBLICAN-PLURALITY DISTRICTS AND UNDERPOPULATES DEMOCRATIC-PLURALITY DISTRICTS

107. In the final congressional map adopted by the IRC on January 17, 2012, the IRC achieved equality of population among districts, with eight of the nine congressional districts having a population of 710,224 residents, and the ninth district having a population of 710,225 residents. A true copy of the IRC's population break-down for the final congressional map is attached as Exhibit 12, and is adopted herein by reference.

108. In contrast, in the Final Legislative Map, the IRC did not achieve population equality among districts, and not even a single district achieved the ideal population of 213,067 residents. A true copy of the IRC's population

break-down for the Final Legislative Map is attached as Exhibit 13, and is adopted herein by reference.

109. The IRC systematically overpopulated Republican-plurality districts. (As used herein, "Republican-plurality district means a legislative district in which more voters are registered with the Republican Party than with any other party, and "Democratic-plurality district" means a legislative district in which more voters are registered with the Democratic Party than with any other political party.)

110. With one exception, every Republican-plurality district exceeds the ideal population of 213,067 residents. These include Districts 1, 5, 6, 11, 12, 14-18, 20-23, 25, and 28. The exception is District 13, which is an oddly-shaped district comprising northern Yuma County and western Maricopa County and is under-populated by 1,366 residents or 0.64% below ideal. A true copy of the IRC's legislative-district party-registration break-down is attached as Exhibit 14, and is adopted herein by reference.

111. Two Republican-plurality districts are more than 8000 persons above population equality: District 12 at 8668, and District 17 at 8107. Two are more than 7000 persons over: District 25 at 7728, and District 16 at 7090. Four are more than 5000 persons over: District 5 at 5973, District 28 at 5646, District 18 at 5100, and District 20 at 5100. District 14 is 4626 persons over. On average, the 16 overpopulated Republican-plurality districts exceed the ideal by 4480 persons or 2.1%.

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112. All of the 14 most overpopulated districts are Republican. All of the 12 under-populated districts, save one (District 13) are Democrat. The four remaining districts are all over-populated by less than 0.30%. Of them, Districts 9 and 26 are Democrat-plurality, and Districts 11 and 23 are Republican-plurality.

113. The IRC systematically under-populated Democratic-plurality districts. With two exceptions, every Democratic-plurality district falls short of the ideal population of 213,067 persons. These include Districts 2-4, 7, 8, 10, 13, 19, 24, 27, 29, and 30. The two exceptions are District 9, which comprises north Tucson and Oro Valley, and District 26, which comprises much of Tempe. These districts are slightly overpopulated from the ideal, respectively by 156 and 591 persons, or by 0.07% and by 0.28%.

114. Thus, eighty-nine percent of the overpopulated districts are Republican and ninety-two percent of the under-populated districts are Democrat.

115. One Democratic-plurality district — District 7 — falls below population equality by 10,041 persons. Four Democratic-plurality districts fall below by more than 8000 persons: District 4 at 8924, District 27 at 8872, District 3 at 8454, and District 2 at 8452. Three more fall below by more than 5000 persons: District 24 at 6408, District 19 at 5979, and District 30 at 5304. District 8 falls below ideal by 4645 persons. On average, the 11 under-populated Democratic-plurality districts fall short of the ideal by 6461 persons or 3.03%.

116. District 7, the only Native American legislative district in the State, falls below population equality by 4.71 percent, the largest absolute deviation in the plan. District 7 is also. Four Democrat districts fall below by more than 3.5 percent: District 4 at 4.19 percent, District 27 at 4.16 percent, and Districts 3 and 2 at 3.97%. Four more fall below by more than 2 percent: District 24 at 3.01 percent, District 19 at 2.81 percent, District 30 at 2.49 percent, and District 8 at 2.18%.

117. On average the 11 under-populated Democrat districts fall short of the ideal by 3.03%. This high average population deviation indicates that an abnormal number of these districts are under-populated and, indeed, overpopulated in excess of 3%. If the IRC had been drawing with equal population as a principal criterion, most of the districts would be expected to be within +/-1% of the ideal. Only nine of the IRC's 2011 districts are that close. If the IRC had used neutral redistricting criteria as its guiding principle in drawing the map, one might see some population deviations higher than one percent, but the pattern of district deviations would not correlate with partisanship to anywhere near the extent seen in the IRC's plan. The only logical explanation is that the IRC's pattern of deviations was deliberate and intended to have a partisan effect to enhance Democrat strength in the Legislature.

118. Exhibit 17, adopted herein by reference, contains a bar chart showing the amplitude of deviation of each district with each district's bar colored according to party registration plurality. The bars colored green are the

districts with Democrat pluralities, while the red bars are Republican.

NO LEGITIMATE STATE INTEREST JUSTIFIES THE IRC'S VARIANCE FROM IDEAL

119. Having achieved exact equality among congressional districts, the IRC had the technical ability to achieve exact equality among legislative districts, and under the circumstances of this action, no legitimate state interest justifies the IRC's variation from exact equality.

120. The technology of demographics has evolved to the point that demographers, assisted by computer science, are capable of drawing legislative districts of precisely equal population. They are also capable of using this same technology to create intentional and arbitrary deviations from the ideal population in order to attain partisan and other political gains. The IRC 2011 Legislative Plan's range of district deviations from +4.07% to -4.71% is remarkably and unnecessarily wide, given the large ideal district population and the absence of any rational state criteria requiring such a wide range of deviation.

121. The IRC was able to create congressional districts of equal population, even when taking into account the Voting Rights Act's requirements for majority-minority districts.

122. Another way to measure district deviations is in terms of the difference between the most and least

populous district called top-to-bottom, overall range or total deviation. For the Final Legislative Plan, total deviation would be calculated by taking the percentage deviation of most populous district, District 10 at +4.07%, and adding to it the percentage deviation of the least populous district, District 7 at -4.71%. Those two percentages are added together without the negative sign (absolute value) to yield a overall deviation range (or total deviation) of 8.79%.

123. In the Final Legislative Plan, the deviation from ideal exceeded 2% in 18 districts. The Final Legislative kept district deviations within 2% for only 12 districts and within 1% for only 9 districts. In contrast, the California Citizens Redistricting Commission constructed all 40 state senate districts within a total deviation of 2% and with 12 of 40 districts with 1%. Other states such as Florida, Georgia, Iowa, Minnesota and Nevada were able to keep their state senate district plan total deviations below 2%. Indiana, Oregon and Virginia drew theirs below 4%.

124. Had the IRC properly followed the criteria for drawing districts mandated by ARIZ. CONST. art. 4, pt. 2, § 1(14), or the neutral criteria recognized as justifying a deviation in legislative districts from ideal population, the IRC could not have made all but one Republican-plurality district over-populated and all but two Democrat-plurality districts under-populated. That such results occurred by chance defies all logic and probability.

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VOTING RIGHTS COMPLIANCE DOES NOT JUSTIFY THE VARIANCE

125. According to the Census Bureau, the Hispanic portion Arizona's population increased from 25.3% in 2000 to 29.6% in 2010. According to the results of the U. S. Census Bureau's 2010 release of the American Community Survey ("ACS"), Hispanics citizens of voting age comprise 17.89% of Arizona's total citizen voting age population.

126. The Final Legislative Map contained what purported to be no more than seven districts in which Hispanic qualified electors could elect the candidates of their choice, which represented no net increase from 2000 to 2010, despite the significant increase in Arizona Hispanic population from 2000 to 2010. These are Districts 2, 3, 4, 19, 27, 29, and 30. A true copy of the IRC's voting-age population break-down for the Final Legislative Map is attached as Exhibit 15, and is adopted herein by reference. The IRC has labeled these "Hispanic opportunity districts."

127. The following chart shows the Hispanic voting-age population ("HVAP") of the seven districts according to the IRC population breakdowns. The chart also shows the Hispanic citizen voting age population ("HCVAP") of the seven districts.

Legislative District	Percentage HVAP	Percentage HCVAP
2	52.8%	41.29%

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3	50.1%	43.59%
4	55.7%	45.38%
19	60.4%	46.26%
27	52.1%	39.82%
29	61.9%	43.88%
30	50.7%	33.01%

128. The correlation between the under-populated districts and the minority percentages in those districts is stronger than the partisan deviation correlation. A chart demonstrating this pattern is contained Exhibit 18, adopted herein by reference. The five most under-populated districts in the IRC's 2012 map are also five of the districts which the IRC labeled "minority opportunity districts." One of these districts is Native American and the other four are Hispanic. All seven of the IRC's Hispanic opportunity districts are under-populated. The ten most under-populated districts in the IRC's 2012 map all have a total voting age minority populations in excess of 50% (or less than 50% non-Hispanic adult whites). Only one additional legislative district has a voting age minority population in excess of 50%. That is District 26, which has a population only .28% over the ideal.

129. It was totally unnecessary for the IRC to create such high deviations, or patterns of deviations, to draft the Hispanic opportunity districts at the HVAP found in the Final Legislative Map. The collective under-population of the IRC's seven Hispanic districts is 32,588 persons from what it would have been if all the districts were draw at the ideal population.

130. Yet there are a number of whole or split precincts on the boundaries of the IRC's seven Hispanic opportunity districts persons which have very high percentages of Hispanic adults and contain about 87,500 persons. These seven districts could have been drafted at or above the ideal district population with the same or higher level of HVAP. Thus, the IRC deliberately separated these highly Hispanic precincts from the IRC's seven Hispanic opportunity districts to use their Democratic votes to shore up the partisan composition of neighboring Democrat-plurality districts, and or to directly or indirectly weaken Republican-plurality districts.

131. This is also true for Legislative District 7, which the IRC drew with a Native American voting age population ("NAVAP") of 63.1%. This district can be drawn with a population deviation of .02% with a NAVAP of 61.0%, more than enough to qualify this as a Native American majority district and to satisfy both sections two and five of the Voting Rights Act.

132. The Benchmark Plan, or the IRC's Legislative Plan adopted and pre-cleared in 2003, contains only two districts in which the Hispanic candidates have been consistently elected to both the one state senate and two state house seats in each of these districts. The first is Benchmark District 13, in Maricopa County (West Phoenix, Central Avondale, and Tolleson, which has a Hispanic Citizen Voting Age Percentage ("HCVAP") of 51.50% and an HVAP of 68.27%. The second is Benchmark District 27, Pima County (primarily the west side of Tucson), which has an HCVAP of 43.67% and an HVAP of

49.89. Benchmark Districts 14 and 16 also have HCVAP percentages in the mid-forty percent range. Benchmark District 14 has an HCVAP of 44.27% and an HVAP of 64.90%, while Benchmark District 16 has an HCVAP of 44.27% and an HVAP of 56.74. Benchmark District 16 also has an African-American Citizen Voting Age Population of over 18% - by far the highest in any legislative district. Benchmark District 14 elects primarily non-Hispanic white candidates while Benchmark District 16 elected either Hispanic or African-American candidates in the last 5 previous elections.

133. The IRC could have drawn at least four majority HCVAP districts and at least one more majority minority CVAP district. The IRC decided instead to create seven weak Hispanic districts, only two of which had HCVAPs above the HCVAP of Benchmark District 27. Even worse, District 29, the successor district to Benchmark District 13, had its HCVAP reduced from 51.50% to 43.88%.

134. The IRC had the opportunity to draw these seats with HCVAP extremely close to or over 50%, but it declined to do. Three of these districts could have been in Maricopa County, one in Pima County and one running along the State's southern border from Yuma to Nogales. Instead, the IRC elected to create seven weaker seats.

135. To create the Democrat-plurality legislative districts with negative population deviations, including the minority districts, the IRC moved substantial numbers of Hispanic voters into neighboring non-Hispanic white Democrat districts to shore up the Democrats' partisan

advantage in such districts. Had the IRC followed the Voting Rights Act and ARIZ. CONST. art. 4, pt. 2, § 1(14), it would have moved the Hispanic voters around the boundary of the seven Hispanic districts to raise the percentage of Hispanic voters in those districts and give the Hispanic community an equal opportunity to elect more candidates of its choice. The IRC refused to do so for the sole reason of increasing the Democrat percentages of the vote in the districts adjacent to these seven districts.

136. In fact, the IRC engaged in intentional invidious dilution of Hispanic voting strength throughout the map. The IRC systematically spread Hispanic Democrats into predominantly non-Hispanic white Democrat districts to increase the strength of Democratic registration pluralities in them.

137. What's more, no correlation exists between satisfying Voting Rights Act section 5 and these districts' under-populations. Specifically, no significant improvement in minority VAP occurred in the VRA districts between the draft map and the final map. District 2 HVAP dropped by 9.6%. HVAP in Districts 3 and 27 marginally declined. HVAP marginally improved in Districts 4, 19, and 29. Native American VAP increased marginally in District 7. Yet the IRC's under-population of all these districts significantly worsened:

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Dist.	Population	Deviation from Ideal	Population Change	Draft VAP %	Final VAP %	VAP Change
2	Draft 212,863 Final 204,615	Draft -204 Final -8452	↓8248	61.4%	52.8%	↓9.6%
3	Draft 210,016 Final 204,613	Draft -3051 Final -8454	↓5403	51.2%	50.1%	↓1.1%
4	Draft 214,082 Final 204,143	Draft +1014 Final -8924	↓9938	53.7%	55.7%	↑2.0%
19	Draft 212,096 Final 207,088	Draft -971 Final -5979	↓5008	60.0%	60.4%	↑0.4%
27	Draft 208,413 Final 204,195	Draft -4654 Final -8872	↓4218	53.7%	52.1%	↓1.6%

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29	Draft 212,258 Final 211,067	Draft -809 Final -2000	↓1191	61.7%	61.9%	↑0.2%
30	Draft 207,918 Final 207,763	Draft -5149 Final -5304	↓155	50.7%	50.7%	---
7	Draft 210,314 Final 203,026	Draft -2753 Final -10,041	↓7288	61.9%	63.1%	↑1.2%

138. Thus, compliance with the Voting Right Act is no rationale for the IRC's violation of the equal population standard. The IRC weakened the ability of the Hispanic community to elect Hispanic candidates of their choice in order to elect more non-Hispanic white Democrats.

139. By letter dated April 26, 2012, the Department of Justice declined to interpose any objection to the Final Legislative Map. The April 26, 2012, letter, however, stated that "we note that Section 5 expressly provides that failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change." Despite the DOJ letter, these are inadequate HCVAP percentages to ensure that Hispanic electors could elect candidates of their choice, and therefore violate the anti-retrogression requirement of Section 5 of the Voting Rights Act.

140. An analysis of the retrogression of Final Legislative Map in terms of HCVAP is attached as Exhibit 16, and is adopted herein by reference. The analysis reveals that the IRC majority of Ms. Mathis, Mr. Herrera, and Ms. McNulty deliberately diluted the voting strength of Hispanic voters to protect Democratic-plurality districts. It shows that the following new legislative districts retrogressed from the benchmark districts by significant percentages of CVAP:

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New Legislative District	Percentage HCVAP Retrogression from the Benchmark District
3	0.08 -
19	5.24 -
27	3.29 -
29	7.62 -
30	11.26 -

141. Such retrogressions could not have taken place had the IRC built the Hispanic districts first, as is the common approach to adhere to the requirements of Section 5, and as was required by ARIZ. CONST. art. 4, pt. 2, §§ 1(14) and 1(16) before it could publish the legislative draft map for the 30-day comment period of Phase Three.

142. The true nature of these districts is revealed by the candidates who filed for office in them. The Secretary of State's records indicate that the candidates who filed by the deadline for the Democratic nominations for state Senate from District 24 are former Senator Ken Cheuvront and Katie Hobbs and for the state House are incumbents Chad Campbell and Lela Alston as well as Jean Cheuvront-McDermott and Tom Nerini. From District 26, they are Ed Ableser for the Senate, and Andrew Sherwood and Juan Mendez for the House. *See* Secretary of State's 2012 Primary Election full listing, found at http://www.azsos.gov/election/2012/Primary/FullListing.htm. Given these are at most influence districts, it is no surprise that only one Hispanic is running in them.

143. It would not have been necessary for the IRC's mapping consultant Strategic Telemetry to use partisan election results to understand exactly what was being done here. Factoring in the effect of under-population of both the Hispanic and adjacent Democratic-plurality districts, coupled with ethnic fragmentation, creates a deliberate and classic gerrymander.

144. Thus, these facts show that the IRC could have made up these districts' shortfalls with minor adjustments in district lines, but chose not to do so to benefit Democratic incumbents or to increase the number of Democratic-plurality districts.

145. What is worse, to the extent the IRC eventually obtained a racial bloc voting analysis, the analysis made no study of the cohesiveness of minority voters, and made no study of the likelihood of white cross-over voting, and therefore was incapable of determining the percentage of CVAP it needed in purportedly Hispanic districts to create an effective Hispanic district, meaning a district in which the Hispanic electors could elect the candidate of their choice, and therefore was also incapable of determining whether it satisfied either Sections 2 or 5 of the Voting Rights Act.

146 What is worse yet, the analysis's sampling of elections was so limited as to cripple its effectiveness and usefulness. Specifically, the racial bloc voting analysis made no study of primary elections, made no study of endogenous elections, meaning actual legislative elections, and limited its focus to exogenous elections, meaning

elections for offices other than the Arizona House of Representatives or Arizona Senate. Because of these deficiencies, the racial bloc voting analysis was essentially useless for determining compliance with sections 2 and 5 of the Voting Rights Act.

147. The only possible explanation for these facts is that the individuals who were drawing the maps for the Arizona Commission were engaged in intentional political gerrymandering. Their method for accomplishing this was to dilute the Hispanic voting strength as much as was politically possible so that they could use these Hispanic Democrats to shore up non-Hispanic white Democratic candidates. The Commission then raised up the Hispanic Democrat percentages for this purpose by under-populating the Hispanic districts. The Commission then artificially increased Democrat electoral strength even more by under-populating the non-Hispanic white Democrat districts so that fewer Democrat votes were necessary in order to control these districts. This fact was still further enhanced by removing Republican voters from these under-populated non-Hispanic white Democrat districts and placing them in highly Republican and massively overpopulated districts.

RESPECTING THE COMPETITIVENESS GOAL DOES NOT JUSTIFY THE VARIANCE FROM EQUALITY

148. In 2002, the IRC final legislative map achieved six competitive districts, in which a candidate of either party with a reasonably well-run campaign had a chance of winning election.

149. In 2012, the IRC retrogressed and achieved only three competitive districts. These include Districts 9, 10, and 18.

150. As a result, respecting the competitiveness goal did not justify the deviations from equality in the Final Legislative Map.

RESPECTING THE NEUTRAL GOALS DOES NOT JUSTIFY THE VARIANCE FROM EQUALITY

151. Respecting city, town, and county boundaries, undivided census tracts, and communities of interest did not justify the IRC's deviation from equality among legislative districts.

152. The Final Legislative Map split five of Arizona's 15 counties twice, and split five counties more than twice. The Final legislative Map left only five counties in a single district. A true copy of the IRC's splits report is attached as Exhibit 19, and is adopted herein by reference.

153. The Final Legislative Map split three of Arizona's Indian reservations twice, and split four reservations more than twice.

154. The Final Legislative Map split the City of Glendale among seven districts, the City of Peoria among five districts, the City of Mesa among five districts, the City of Tempe among three districts, the City of Surprise among three districts, the City of Scottsdale among three

districts, the City of El Mirage among three districts, and the City of Chandler among three districts.

155. Respecting boundaries of counties, cities, towns, reservations, communities of interest, and undivided census tracts did not require the high deviations contained in the Final Legislative Plan.

156. Similarly, neither compactness nor contiguity bears any relation to the IRC's deliberate overpopulation of Republican districts and under population of Democrat districts.

157. Based on the foregoing, the IRC has no valid reason for its violation of the one-person, one vote rule of the United States Constitution or the equal population requirement of the Arizona Constitution.

FIRST CLAIM FOR RELIEF

158. Plaintiffs adopt herein by reference all allegations of all preceding paragraphs.

159. The one-person/one-vote requirement of the equal protection clause of the Fourteenth Amendment does not permit legislative districts to deviate from the ideal population except when justified by a compelling state interest. A plan with legislative districts that do not exceed the ideal population by more than five percent over or five percent under the ideal is presumed not to violate the one-person/one vote requirement of the equal protection clause of the Fourteenth Amendment, but the

presumption of constitutionality is rebuttable. *Larios*, 300 F.Supp.2d at 1341.

160. Not compelled or justified by any legitimate state interest, such as compliance with the Voting Rights Act, or the neutral districting criteria, the IRC's systematic overpopulating of Republican-plurality districts and systematic under-populating of Democratic-plurality districts was arbitrary and discriminatory, denied Plaintiffs, and each of them, their rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution, and deprived them of "rights, privileges, or immunities secured by the Constitution and laws" of the United States, in violation of 28 U.S.C. § 1983. *Larios*, 300 F.Supp.2d at 1341.

161. The constitutional defects in the Final Legislative Map are so comprehensive that the IRC will have no choice but to abandon the Final Legislative Map and begin anew.

162. Because this is an action to enforce 28 U.S.C. § 1983, Plaintiffs are entitled to an award of attorneys' fees under 28 U.S.C. § 1988 against the IRC.

163. Plaintiffs therefore are entitled to judgment declaring that the Final Legislative Map violates the equal protection clause of the Fourteenth Amendment, and 28 U.S.C. § 1983, and thereby injures Plaintiffs, and each of them, and is null and void, enjoining Defendants and each of them from implementing or enforcing the Final Legislative Map, mandating that the IRC draft a new map for legislative elections following the 2012 elections,

and awarding Plaintiffs reasonable attorneys fees under 28 U.S.C. § 1988 against the IRC.

SECOND CLAIM FOR RELIEF

164. Plaintiff adopts herein by reference all allegations of all preceding paragraphs.

165. This claim is so related to the First Claim for Relief that it forms part of the same case or controversy under Article III of the United States Constitution, and this Court has jurisdiction of it under 28 U.S.C. § 1367.

166. ARIZ. CONST. art. 4, pt. 2, § 1(14)(B) requires the IRC to draw legislative districts with equal population to the extent practicable.

167. The IRC could have drawn legislative districts that achieved the ideal population had it wanted to do so, just as it did with congressional districts.

168. To do so, however, would have prevented the McNulty/Herrera/Mathis bloc from maximizing the number of Democratic-plurality districts. As a result, the McNulty/Herrera/Mathis bloc deliberately defied the equal population requirement of ARIZ. CONST. art. 4, pt. 2, § 1(14)(B) for the sole purpose of maximizing the partisan interests of the Democratic Party.

169. The Final Legislative Map therefore violates the equal population requirement of ARIZ. CONST. art. 4, pt. 2, § 1(14)(B), and thereby injures Plaintiffs, and each

of them, and is null and void.

170. This is an action to compel the members of the IRC, all of whom are state officers, to perform an act imposed by law as a duty on the them, and Plaintiffs therefore are entitled to an award of reasonable attorneys' fees and other expenses as provided for in A.R.S. § 12-2030 against the IRC and its members in their official capacities.

171. Plaintiffs therefore are entitled to judgment declaring that the Final Legislative Map violates the equal population requirement of ARIZ. CONST. art. 4, pt. 2, § 1(14)(B), and therefore is null and void, enjoining Defendants and each of them from implementing or enforcing the Final Legislative Map, mandating that the IRC draft a new map for legislative elections following the 2012 elections, and awarding Plaintiffs reasonable attorneys fees and other expenses as provided for in A.R.S. § 12-2030 against the IRC.

DEMAND FOR JUDGMENT

Plaintiffs respectfully demand that the Court award it the following relief against all defendants:

A. Declaring that the Final Legislative Map violates the equal protection clause of the Fourteenth Amendment, and 28 U.S.C. § 1983, and the equal population requirement of ARIZ. CONST. art. 4, pt. 2, § 1(14)(B), and thereby injures Plaintiffs, and each of them, and is null and void;

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B. Enjoining Defendants and each of them from implementing or enforcing the Final Legislative Map,

C. Mandating that the IRC draft a new map for legislative elections following the 2012 elections, and

D. Awarding Plaintiffs such other relief as is just, proper, or equitable under the facts and circumstances of this case.

Plaintiffs further respectfully demand that the Court award it the following relief against the IRC only: an award of reasonable attorneys' fees under 28 U.S.C. § 1988 and A.R.S. § 12-2030, and an award of other expenses under A.R.S. § 12-2030.

RESPECTFULLY SUBMITTED ON November 16, 2012.

APPENDIX G — ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED DECEMBER 3, 2012 BY DEFENDANTS ARIZONA INDEPENDENT REDISTRICTING COMMISSION AND COMMISSIONERS MATHIS, MCNULTY, HERRERA, FREEMAN, AND STERTZ SOLELY IN THEIR OFFICIAL CAPACITIES

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No.: 2:12-CV-00894-ROS-NVW-RRC

Wesley W. Harris, *et al.*,

Plaintiffs,

vs.

Arizona Independent Redistricting Commission, *et al.*,

Defendants.

ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT

(ASSIGNED TO THREE-JUDGE PANEL)

For their Answer to Plaintiffs' Second Amended Complaint (the "Complaint"), Defendants Arizona Independent Redistricting Commission and Commissioners

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Mathis, McNulty, Herrera, Freeman, and Stertz solely in their official capacities (collectively, the "Commission") admit, deny, and allege as follows. Any allegation not specifically admitted in this Answer is denied.

1. Answering Paragraph 1 of the Complaint, the Commission admits that Arizona voters passed Proposition 106 as an amendment to the Arizona Constitution. The Commission denies the remaining allegations made in that paragraph.

2. Answering Paragraph 2 of the Complaint, the Commission admits that it is a synopsis or summary of Plaintiffs' claims. The Commission denies the remaining allegations made in that paragraph.

3. Answering Paragraph 3 of the Complaint, the Commission admits that Plaintiff Wesley Harris is a member of the Republican Party. The Commission lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations made in that paragraph and therefore denies them.

4. Answering Paragraph 4 of the Complaint, the Commission lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding Plaintiffs' residences and therefore denies them. The Commission denies the remaining allegations made in that paragraph.

5. Answering Paragraph 5 of the Complaint, the Commission asserts that the cited portions of the Arizona Constitution speak for themselves.

6. Answering Paragraph 6 of the Complaint, the Commission admits the allegations made in that paragraph.

7. Answering Paragraph 7 of the Complaint, the Commission admits the allegations made in that paragraph.

8. Answering Paragraph 8 of the Complaint, the Commission admits that Plaintiffs allege the Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1367, 2201, 2202, and 2284 and 42 U.S.C. § 1983. The Commission denies that the Court has subject-matter jurisdiction, based on the Eleventh Amendment, over Plaintiffs' Second Claim for Relief and those elements of Plaintiffs' First Claim for Relief that implicate Arizona law. Even where the Court has subject-matter jurisdiction, the Commission denies that the Court should exercise its subject-matter jurisdiction where, as a matter of federalism and comity, the Court should certify state law constitutional issues to the Arizona Supreme Court, or should abstain and let the state courts of Arizona decide in a state action any relevant interpretations of Arizona constitutional law. The Commission also denies that the Court may exercise personal or subject-matter jurisdiction over the individual Commissioners in light of the doctrine of legislative immunity. The Commission denies the remaining allegations made in that paragraph.

9. Answering Paragraph 9 of the Complaint, the Commission admits the allegations made in that paragraph.

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10. Answering Paragraph 10 of the Complaint, the Commission admits the allegations made in that paragraph.

11. Answering Paragraph 11 of the Complaint, the Commission admits the allegations made in that paragraph.

12. Answering Paragraph 12 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

13. Answering Paragraph 13 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

14. Answering Paragraph 14 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

15. Answering Paragraph 15 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

16. Answering Paragraph 16 of the Complaint, the Commission admits the allegations made in that paragraph.

17. Answering Paragraph 17 of the Complaint, the Commission admits that Commissioner Mathis, a registered Independent from Pima County, submitted an application dated October 12, 2010 to the Appointment Commission and that a copy of the application is attached to the Complaint as Exhibit 1. The Commission asserts that the application speaks for itself. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

18. Answering Paragraph 18 of the Complaint, the Commission admits that the application did not include the listed statements, denies that the application required Commissioner Mathis to make any such statements, and admits that a copy of a campaign finance report is attached to the Complaint as Exhibit 2. The Commission asserts that the listed statements were irrelevant and that the campaign finance report speaks for itself. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

19. Answering Paragraph 19 of the Complaint, the Commission admits that Commissioner Mathis answered "No" to question number 6 of her application and asserts that such answer was truthful. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

20. Answering Paragraph 20 of the Complaint, the Commission admits the allegations made in that paragraph.

21. Answering Paragraph 21 of the Complaint, the Commission alleges that the record of the Commission interviews speaks for itself and, insofar as the paragraph contains verbatim citations to the record, admits the verbatim citations. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case,

22. Answering Paragraph 22 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

23. Answering Paragraph 23 of the Complaint, the Commission admits the allegations made in that paragraph.

24. Answering Paragraph 24 of the Complaint, the Commission admits the allegations made in that paragraph.

25. Answering Paragraph 25 of the Complaint, the Commission admits that Mr. Mathis attended certain public meetings of the Commission. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

26. Answering Paragraph 26 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

27. Answering Paragraph 27 of the Complaint, the Commission admits that it was fully constituted on March

1, 2011 and asserts that Article 4, Part 2, § 1(9) of the Arizona Constitution speaks for itself. The Commission denies the remaining allegations made in that paragraph.

28. Answering Paragraph 28 of the Complaint, the Commission admits that it selected Commissioners Herrera and Freeman to serve as co-vice-chairs. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

29. Answering Paragraph 29 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

30. Answering Paragraph 30 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

31. Answering Paragraph 31 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

32. Answering Paragraph 32 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

33. Answering Paragraph 33 of the Complaint, the Commission admits that it met in executive session at the times alleged in order to review proposals that were

confidential at the time and asserts that Article 4, Part 2, § 1(12) of the Arizona Constitution speaks for itself. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

34. Answering Paragraph 34 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

35. Answering Paragraph 35 of the Complaint, the Commission admits that it selected Osborn Maledon, P.A. and Ballard Spahr LLP as its counsel following both public and executive sessions on May 12 and May 13, 2011. The Commission further admits that Mr. Kanefield was registered as a Republican at the time of his application and asserts that his application speaks for itself. The Commission lacks knowledge or information sufficient to form a belief as to the truth of the other allegations made in that paragraph regarding the duration of Mr. Kanefield's party registration as a Republican and Democrat and therefore denies them. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

36. Answering Paragraph 36 of the Complaint, the Commission admits that Commissioners McNulty, Herrera, and Mathis agreed to select the same Republican counsel. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

37. Answering Paragraph 37 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

38. Answering Paragraph 38 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

39. Answering Paragraph 39 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

40. Answering Paragraph 40 of the Complaint, the Commission admits that at the Commission's June 15, 2011 meeting, the four companies identified were selected to interview for the mapping consultant contract and that an executive session to discuss the proposals, which were confidential at that time, preceded that decision. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

41. Answering Paragraph 41 of the Complaint, the Commission admits that following presentations by candidates for mapping consultant on June 24, 2011, Commissioners Mathis, McNulty, and Herrera gave Strategic Telemetry perfect scores in certain categories and that Strategic Telemetry is headquartered in Washington, D.C. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

42. Answering Paragraph 42 of the Complaint, the Commission admits that a copy of the July 1, 2011 Yellow Sheet Report published by Arizona Capitol Reports, LLC is attached to the Complaint as Exhibit 3 and asserts that the document speaks for itself and is inadmissible hearsay. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

43. Answering Paragraph 43 of the Complaint, the Commission admits that Mr. Strasma is experienced in microtargeting, is considered to be a pioneer in the use of high-tech statistical modeling, served as the Targeting Director for President Obama's 2008 campaign, worked on Senator Kerry's 2004 presidential campaign, and contributed funds to certain Democratic candidates. The Commission lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding Mr. Strasma's involvement in Wisconsin recall elections and therefore denies them. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

44. Answering Paragraph 44 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

45. Answering Paragraph 45 of the Complaint, the Commission admits only that Commissioner Freeman has asserted that Commissioner Mathis discussed the selection of Strategic Telemetry as mapping consultant with him and that Exhibit 4 to the Complaint contains the

transcript of Commissioner Freeman's interview by the Attorney General's Office. The Commission asserts that the transcript speaks for itself and that communications among Commissioners regarding the selection of the mapping consultant are protected by the legislative privilege. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

46. Answering Paragraph 46 of the Complaint, the Commission admits that Commissioner Stertz has asserted that Commissioner Mathis discussed the selection of Strategic Telemetry as mapping consultant with him and that Exhibit 5 to the Complaint contains the transcript of Commissioner Stertz's interview by the Attorney General's Office. The Commission asserts that the transcript speaks for itself and that communications among Commissioners regarding the selection of the mapping consultant are protected by the legislative privilege. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

47. Answering Paragraph 47 of the Complaint, the Commission admits only that Commissioner Herrera communicated with other Commissioners regarding the selection of the mapping consultant during public sessions of properly-noticed Commission meetings and that the paragraph quotes a portion of the June 29, 2011 Commission meeting transcript. The Commission asserts that the transcript speaks for itself and that communications among Commissioners regarding the

selection of the mapping consultant are protected by the legislative privilege. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

48. Answering Paragraph 48 of the Complaint, the Commission admits only that Commissioner Mathis communicated with Commissioner McNulty, and other Commissioners, during public sessions of properly-noticed Commission meetings regarding the selection of the mapping consultant. The Commission asserts that communications among Commissioners regarding the selection of the mapping consultant are protected by the legislative privilege. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

49. Answering Paragraph 49 of the Complaint, the Commission admits that it met to consider the candidates for mapping consultant on June 29, 2011 and that, following an executive session, its counsel announced that the State Procurement Office had delegated the procurement of a mapping consultant to the Commission. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

50. Answering Paragraph 50 of the Complaint, the Commission denies that a "coalition" between Commissioners Mathis, McNulty, and Herrera existed. The Commission admits the remaining allegations made in that paragraph, but denies that they are relevant to any issue in this case.

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51. Answering Paragraph 51 of the Complaint, the Commission admits that Commissioner Mathis read from some prepared remarks regarding her vote for Strategic Telemetry. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

52. Answering Paragraph 52 of the Complaint, the Commission asserts that the Arizona Attorney General Agency Handbook speaks for itself. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

53. Answering Paragraph 53 of the Complaint, the Commission denies that the Commission's decision to hire Strategic Telemetry irreparably damaged public confidence in the IRC, but admits that people who objected to the decision criticized the Commission and Chairperson Mathis at subsequent meetings. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

54. Answering Paragraph 54 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

55. Answering Paragraph 55 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

56. Answering Paragraph 56 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

57. Answering Paragraph 57 of the Complaint, the Commission admits that Commissioners Freeman and Stertz agreed to be interviewed under oath. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

58. Answering Paragraph 58 of the Complaint, the Commission admits that Commissioners Mathis, McNulty, and Herrera received separate counsel at the Commission's expense and did not agree to be interviewed under oath as part of the Attorney General's improper investigation and that the Attorney General filed suit in state court. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

59. Answering Paragraph 59 of the Complaint, the Commission admits that it has taken the position that it is subject to the Arizona Constitution's public-meeting requirement that applies only to the Commission, rather than the statutory open-meeting law; that its counsel had provided some training on open-meeting-law compliance; and that it had discussed the open-meeting law in connection with conducting its public and executive sessions. The Commission asserts that because the allegations made in that paragraph regarding

the Commission's rights and obligations call for legal conclusions, a response is not required and the Commission denies them. The Commission further asserts that most of the time in executive session related to reviewing confidential procurement documents in cooperation with the State Procurement Office. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

60. Answering Paragraph 60 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

61. Answering Paragraph 61 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

62. Answering Paragraph 62 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

63. Answering Paragraph 63 of the Complaint, the Commission denies the allegations made in that paragraph.

64. Answering Paragraph 64 of the Complaint, the Commission asserts that the cited sections of the Arizona Constitution and case law speak for themselves.

65. Answering Paragraph 65 of the Complaint, the Commission asserts that the cited case law speaks for itself.

66. Answering Paragraph 66 of the Complaint, the Commission asserts that the cited case law speaks for itself.

67. Answering Paragraph 67 of the Complaint, the Commission asserts that the cited case law speaks for itself.

68. Answering Paragraph 68 of the Complaint, the Commission asserts that the cited case law speaks for itself.

69. Answering Paragraph 69 of the Complaint, the Commission admits the allegations made in that paragraph.

70. Answering Paragraph 70 of the Complaint, the Commission admits the allegations made in that paragraph.

71. Answering Paragraph 71 of the Complaint, the Commission admits that it considered two possible congressional grid maps and that it chose Grid Map No. 2, a copy of which is attached to the Complaint. The Commission asserts that the cited sections of the Arizona Constitution speak for themselves. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

72. Answering Paragraph 72 of the Complaint, the Commission asserts that the cited portions of the transcript speak for themselves. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

73. Answering Paragraph 73 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

74. Answering Paragraph 74 of the Complaint, the Commission admits the allegations made in that paragraph.

75. Answering Paragraph 75 of the Complaint, the Commission admits the allegations made in that paragraph.

76. Answering Paragraph 76 of the Complaint, the Commission admits only that Commissioners McNulty, Herrera, Stertz, and Freeman each proposed certain mapping iterations. The Commission denies the remaining allegations made in that paragraph.

77. Answering Paragraph 77 of the Complaint, the Commission admits only that Commissioners McNulty, Herrera, Stertz, and Freeman each proposed certain mapping iterations. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

78. Answering Paragraph 78 of the Complaint, the Commission denies the allegations made in that paragraph.

79. Answering Paragraph 79 of the Complaint, the Commission admits that Commissioner Mathis worked on a congressional map to reach a compromise between alternative proposed versions outside of Maricopa County; that she presented the map at a September 26, 2011 meeting; and that some referred to the map as the "donut-hole map." The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

80. Answering Paragraph 80 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

81. Answering Paragraph 81 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

82. Answering Paragraph 82 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

83. Answering Paragraph 83 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

84. Answering Paragraph 84 of the Complaint, the Commission admits that following its approval of the congressional map, it worked on the legislative map. The Commission denies the remaining allegations made in that paragraph.

85. Answering Paragraph 85 of the Complaint, the Commission admits the allegations made in that paragraph.

86. Answering Paragraph 86 of the Complaint, the Commission asserts that because the allegations made in that paragraph call for legal conclusions, a response is not required and the Commission denies them.

87. Answering Paragraph 87 of the Complaint, the Commission admits the allegations made in that paragraph.

88. Answering Paragraph 88 of the Complaint, the Commission denies the allegations made in that paragraph.

89. Answering Paragraph 89 of the Complaint, the Commission denies the allegations made in that paragraph.

90. Answering Paragraph 90 of the Complaint, the Commission denies the allegations made in that paragraph.

91. Answering Paragraph 91 of the Complaint, the Commission admits the allegations made in that paragraph.

92. Answering Paragraph 92 of the Complaint, the Commission admits that the Arizona Legislature approved House Concurrent Memorial 2001 on November 1, 2011 and asserts that the Memorial speaks for itself. The Commission denies the remaining allegations made in that paragraph.

93. Answering Paragraph 93 of the Complaint, the Commission admits that the Governor sent a letter to the Commissioners on October 26, 2011 and requested a response by October 31, 2011 and asserts that the letter speaks for itself. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

94. Answering Paragraph 94 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that the Governor's actions were based on the Chairperson's response and denies that the allegations are relevant to any issue in this case.

95. Answering Paragraph 95 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

96. Answering Paragraph 96 of the Complaint, the Commission admits the allegations made in that

paragraph, but denies that they are relevant to any issue in this case.

97. Answering Paragraph 97 of the Complaint, the Commission denies the allegations made in that paragraph.

98. Answering Paragraph 98 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

99. Answering Paragraph 99 of the Complaint, the Commission admits only that the November 29, 2011 Commission meeting agenda included the Legislative recommendations and that Paragraph 99 cites a portion of the November 29, 2011 Commission meeting transcript. The Commission asserts that the transcript of the meeting speaks for itself. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

100. Answering Paragraph 100 of the Complaint, the Commission admits only that Paragraph 100 cites a portion of the November 29, 2011 Commission meeting transcript. The Commission asserts that the transcript of the meeting speaks for itself. The Commission denies the remaining allegations made in that paragraph and denies that they are relevant to any issue in this case.

101. Answering Paragraph 101 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

102. Answering Paragraph 102 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

103. Answering Paragraph 103 of the Complaint, the Commission denies the allegations made in that paragraph and denies that they are relevant to any issue in this case.

104. Answering Paragraph 104 of the Complaint, the Commission admits that between November 29, 2011 and January 17, 2012, it made numerous changes in the draft legislative map, some of which are described in the chart. The Commission admits the changes to legislative districts 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 21, 23, and 27 were made, but denies that Paragraph 104 fully and completely describes the Commission's changes to those districts and denies allegations that include vague, imprecise geographic descriptions. With regard to the allegation regarding legislative district 2, the Commission admits that a portion of Cochise County was moved from legislative district 2 to legislative district 14 and that Green Valley was added to legislative district 2, but denies that more of Tucson was added to the district and denies that Paragraph 104 fully and completely describes the changes to district 2. With regard to the allegations concerning district 15, the Commission admits that the district includes area west of I-17, but denies that all areas south of Union Hills were removed from the district in the final map and denies that Paragraph 104 fully and completely describes changes to district 15. With regard to the allegation concerning district 20, the Commission admits that the final map includes parts of Glendale that the draft map did not

include, but denies that the area is accurately described as eastern Glendale and denies that Paragraph 104 fully and completely describes the changes to district 20. With regard to the allegations concerning District 24, the Commission admits the allegation concerning the Salt River Pima- Maricopa Indian Community, but denies the allegation concerning northeastern Scottsdale and denies that Paragraph 104 fully and completely describes the changes to district 24. With regard to District 26, the Commission admits the allegation concerning the Salt River Pima-Maricopa Indian Community, but denies the allegation concerning northeastern Scottsdale and denies that Paragraph 104 fully and completely describes the changes to district 26. The Commission denies the remaining allegations made in that paragraph.

105. Answering Paragraph 105 of the Complaint, the Commission admits that it approved the final legislative map on January 17, 2012. The Commission denies the remaining allegations made in that paragraph.

106. Answering Paragraph 106 of the Complaint, the Commission denies the allegations made in that paragraph.

107. Answering Paragraph 107 of the Complaint, the Commission admits the allegations made in that paragraph, but denies that they are relevant to any issue in this case.

108. Answering Paragraph 108 of the Complaint, the Commission admits the allegations made in that paragraph.

109. Answering Paragraph 109 of the Complaint, the Commission denies the allegations made in that paragraph.

110. Answering Paragraph 110 of the Complaint, the Commission admits that the populations of Districts 1, 5, 6, 11, 12, 14, 15, 16, 17, 18, 20, 21, 22, 23, 25, and 28 exceed 213,067 residents; that District 13's population is 1,366 residents below 213,067; and that Exhibit 14, which includes some but not all of the data that the Commission generated to evaluate the competitiveness of the districts, includes the Commission's legislative-district party-registration breakdown. The Commission denies the remaining allegations made in that paragraph.

111. Answering Paragraph 111 of the Complaint, the Commission denies Plaintiffs' calculation regarding District 18. The Commission admits the remaining allegations made in that paragraph, but asserts that the seventeen Republican-plurality districts – including District 13, which has a population lower than the ideal population – exceed the ideal population by an average of 4,138 people, or 1.9 percent.

112. Answering Paragraph 112 of the Complaint, the Commission admits that, based on Exhibit 14, the fourteen districts with highest population have a Republican plurality, four other districts exceed the ideal district population by less than .3 percent, District 9 has a Democratic plurality, and Districts 11 and 23 have a Republican plurality. The Commission asserts that, according to Exhibit 14, District 26 has a plurality of

voters registered as other than Democrat or Republican. The Commission asserts that of the twelve districts with populations lower than the ideal district population, ten have a Democratic plurality, one has a Republican plurality, and one has a plurality of voters registered as other than Democrat or Republican. The Commission denies the remaining allegations made in that paragraph.

113. Answering Paragraph 113 of the Complaint, the Commission admits that Districts 2, 3, 4, 7, 8, 10, 24, 27, 29, and 30 have a Democratic plurality and are below the ideal district population, that District 9 has a Democratic plurality and is slightly above the ideal district population (by approximately .07 percent), and that District 26 is slightly above the ideal population (by approximately .28 percent). The Commission asserts that District 13, which is below the ideal population, has a Republican plurality; that District 19, which is below the ideal population, has a plurality of voters registered as other than Democrat or Republican; and that District 26, which is above the ideal population, has a plurality of voters registered as other than Democrat or Republican. The Commission denies the remaining allegations made in that paragraph.

114. Answering Paragraph 114 of the Complaint, the Commission admits that approximately 89 percent of the districts that exceed the ideal district population have a Republican plurality based on Exhibit 14 and asserts that approximately 83 percent of the districts that are lower than the ideal district population have a Democratic plurality based on Exhibit 14. The Commission denies the remaining allegations made in that paragraph.

115. Answering Paragraph 115 of the Complaint, the Commission denies that District 19 has a Democratic plurality based on Exhibit 14, that there are eleven Democratic-plurality districts with less than the ideal population, and that the Democratic-plurality districts that are below the ideal population fall short of the ideal population by 6,461 people (3.03 percent). The Commission asserts that, based on Exhibit 14, District 19 has a plurality of voters registered as other than Democrat or Republican. The Commission admits the remaining allegations made in that paragraph.

116. Answering Paragraph 116 of the Complaint, the Commission denies that District 19 is a Democratic district based on voter registration in Exhibit 14 and asserts that, based on Exhibit 14, it has a plurality of voters registered as other than Democrat or Republican. The Commission asserts that the various competitiveness indices that consider past election results indicate that voters in District 19 tend to support Democratic candidates. The Commission admits the remaining allegations made in that paragraph.

117. Answering Paragraph 117 of the Complaint, the Commission admits that nine of the 30 districts have populations within one percent of the ideal population. The Commission denies the remaining allegations made in that paragraph.

118. Answering Paragraph 118 of the Complaint, the Commission denies that Exhibit 17 to the Complaint contains the chart described and asserts that the

chart attached as part of Exhibit 18 is inaccurate. The Commission denies the remaining allegations made in that paragraph.

119. Answering Paragraph 119 of the Complaint, the Commission admits that it possessed the technical ability to achieve exact equality, which it asserts is not required for legislative districts. The Commission denies the remaining allegations made in that paragraph.

120. Answering Paragraph 120 of the Complaint, the Commission admits that demographers can create districts of equal population. The Commission lacks knowledge or information sufficient to form a belief as to the truth of the other allegations made in that paragraph regarding demographers' capabilities and therefore denies them. The Commission denies the remaining allegations made in that paragraph.

121. Answering Paragraph 121 of the Complaint, the Commission admits that it created congressional districts of equal population and took into account the Voting Rights Act's requirements when creating those districts, but denies that Paragraph 121 accurately describes the Voting Rights Act's requirements.

122. Answering Paragraph 122 of the Complaint, the Commission admits the allegations made in that paragraph, except that the figures included in the paragraph result in a total deviation of 8.78%.

123. Answering Paragraph 123 of the Complaint, the Commission admits the allegations made regarding the population deviations in Arizona's legislative districts. The Commission lacks knowledge or information sufficient to form a belief as to the truth of the allegations made in that paragraph regarding other states and therefore denies them. The Commission denies the remaining allegations made in that paragraph.

124. Answering Paragraph 124 of the Complaint, the Commission denies the allegations made in that paragraph.

125. Answering Paragraph 125 of the Complaint, the Commission admits that the figures provided are approximately correct, but denies that the ACS figures were released in 2010. The Commission asserts that the ACS data is not available at the block level and that the citizen voting-age population figures are necessarily approximate.

126. Answering Paragraph 126 of the Complaint, the Commission admits that a copy of the voting-age population breakdown is attached as Exhibit 15 of the Complaint and asserts that it speaks for itself. The Commission denies the remaining allegations made in that paragraph.

127. Answering Paragraph 127 of the Complaint, the Commission admits that the Hispanic voting-age population and Hispanic citizen voting-age population figures for the seven listed districts are approximately

correct. The Commission asserts that the ACS data is not available at the block level and that the citizen voting-age population figures are necessarily approximate. The Commission denies the remaining allegations made in that paragraph.

128. Answering Paragraph 128 of the Complaint, the Commission denies that only seven districts provided Hispanic voters with the ability to elect candidates of their choice and that the Commission used the label "minority opportunity districts." The Commission admits the remaining allegations made in that paragraph and asserts that minority voters also have the ability to elect their candidates of choice in districts 24 and 26.

129. Answering Paragraph 129 of the Complaint, the Commission denies the allegations made in that paragraph and asserts that the deviations in the map accommodate the goals identified in the Arizona Constitution.

130. Answering Paragraph 130 of the Complaint, the Commission admits that some whole or split precincts exist on the boundaries of some of the districts in which Hispanic voters have the ability to elect their candidates of choice. The Commission lacks knowledge or information sufficient to form a belief as to the truth of the allegations made in that paragraph regarding other map-drawing alternatives and therefore denies them. The Commission denies the remaining allegations made in that paragraph and asserts that the districts were drawn to accommodate the goals identified in the Arizona Constitution.

131. Answering Paragraph 131 of the Complaint, the Commission asserts that District 7 has a Native-American voting-age population of 63.7 percent. The Commission lacks knowledge or information sufficient to form a belief as to the truth of the allegations made in that paragraph regarding other map-drawing alternatives and therefore denies them. The Commission denies the remaining allegations made in that paragraph and asserts that District 7 was drawn to accommodate the goals identified in the Arizona Constitution.

132. Answering Paragraph 132 of the Complaint, the Commission admits that the figures provided are approximately correct, but denies that the allegations provide a full and complete analysis of which benchmark districts provided minority voters the ability to elect the candidate of their choice. The Commission asserts that the ACS data is not available at the block level and that the citizen voting-age population figures are necessarily approximate. The Commission denies the remaining allegations made in that paragraph.

133. Answering Paragraph 133 of the Complaint, the Commission lacks knowledge or information sufficient to form a belief as to the truth of the allegations made in that paragraph regarding other map-drawing alternatives and therefore denies them. The Commission denies the remaining allegations made in that paragraph.

134. Answering Paragraph 134 of the Complaint, the Commission lacks knowledge or information sufficient to form a belief as to the truth of the allegations made in

that paragraph regarding other map-drawing alternatives and therefore denies them. The Commission denies the remaining allegations made in that paragraph.

135. Answering Paragraph 135 of the Complaint, the Commission denies the allegations made in that paragraph.

136. Answering Paragraph 136 of the Complaint, the Commission denies the allegations made in that paragraph.

137. Answering Paragraph 137 of the Complaint, the Commission denies the allegations made in that paragraph and asserts that changes in the districts accommodated the goals identified in the Arizona Constitution.

138. Answering Paragraph 138 of the Complaint, the Commission denies the allegations made in that paragraph.

139. Answering Paragraph 139 of the Complaint, the Commission admits that the Department of Justice refused to object to the legislative map in an April 26, 2012 letter, which the Commission asserts speaks for itself. The Commission denies the remaining allegations made in that paragraph.

140. Answering Paragraph 140 of the Complaint, the Commission denies the allegations made in that paragraph.

141. Answering Paragraph 141 of the Complaint, the Commission denies the allegations made in that paragraph.

142. Answering Paragraph 142 of the Complaint, the Commission admits the allegations identifying the individual candidates who filed for nominations. The Commission denies the remaining allegations made in that paragraph.

143. Answering Paragraph 143 of the Complaint, the Commission denies the allegations made in that paragraph.

144. Answering Paragraph 144 of the Complaint, the Commission denies the allegations made in that paragraph.

145. Answering Paragraph 145 of the Complaint, the Commission denies the allegations made in that paragraph.

146. Answering Paragraph 146 of the Complaint, the Commission denies the allegations made in that paragraph.

147. Answering Paragraph 147 of the Complaint, the Commission denies the allegations made in that paragraph.

148. Answering Paragraph 148 of the Complaint, the Commission lacks knowledge or information sufficient to

form a belief as to the truth of the allegations made in that paragraph and therefore denies them.

149. Answering Paragraph 149 of the Complaint, the Commission denies the allegations made in that paragraph.

150. Answering Paragraph 150 of the Complaint, the Commission denies the allegations made in that paragraph.

151. Answering Paragraph 151 of the Complaint, the Commission denies the allegations made in that paragraph.

152. Answering Paragraph 152 of the Complaint, the Commission admits that the allegations accurately describe the information in Exhibit 19. The Commission denies the remaining allegations made in that paragraph.

153. Answering Paragraph 153 of the Complaint, the Commission denies that the final legislative map split reservations more than three times. The Commission admits the remaining allegations made in that paragraph.

154. Answering Paragraph 154 of the Complaint, the Commission denies that the final legislative map split the City of Tempe three times, asserts that the map split the City of Tempe four times, and admits the remaining allegations made in that paragraph.

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155. Answering Paragraph 155 of the Complaint, the Commission denies the allegations made in that paragraph.

156. Answering Paragraph 156 of the Complaint, the Commission denies the allegations made in that paragraph.

157. Answering Paragraph 157 of the Complaint, the Commission denies the allegations made in that paragraph.

158. Answering Paragraph 158 of the Complaint, the Commission incorporates by reference its responses to Paragraphs 1 through 157.

159. Answering Paragraph 159 of the Complaint, the Commission asserts that because the allegations made in that paragraph call for legal conclusions, a response is not required and the Commission denies them.

160. Answering Paragraph 160 of the Complaint, the Commission denies the allegations made in that paragraph.

161. Answering Paragraph 161 of the Complaint, the Commission denies the allegations made in that paragraph.

162. Answering Paragraph 162 of the Complaint, the Commission denies the allegations made in that paragraph.

Appendix G

163. Answering Paragraph 163 of the Complaint, the Commission denies the allegations made in that paragraph.

164. Answering Paragraph 164 of the Complaint, the Commission incorporates by reference its responses to Paragraphs 1 through 163.

165. Answering Paragraph 165 of the Complaint, the Commission denies the allegations made in that paragraph.

166. Answering Paragraph 166 of the Complaint, the Commission asserts that because the allegations made in that paragraph call for legal conclusions, a response is not required and the Commission denies them.

167. Answering Paragraph 167 of the Complaint, the Commission denies the allegations made in that paragraph.

168. Answering Paragraph 168 of the Complaint, the Commission denies the allegations made in that paragraph.

169. Answering Paragraph 169 of the Complaint, the Commission denies the allegations made in that paragraph.

170. Answering Paragraph 170 of the Complaint, the Commission denies the allegations made in that paragraph.

171. Answering Paragraph 171 of the Complaint, the Commission denies the allegations made in that paragraph.

172. For its affirmative defenses, the Commission alleges as follows:

a. The Court lacks subject-matter jurisdiction, based on the Eleventh Amendment, over Plaintiffs' Second Claim for Relief and those elements of Plaintiffs' First Claim for Relief that implicate Arizona law.

b. Commissioners Freeman, Herrera, Mathis, McNulty, and Stertz are protected by legislative immunity and therefore are not subject to suit by Plaintiffs for their work in connection with Arizona's legislative map.

c. The Court must abstain from determining any issues implicating Arizona constitutional law until the State resolves such issues, as required by *Railroad Commission v. Pullman Company*, 312 U.S. 496 (1941) and related abstention principles.

d. The Court's resolution of any claims based on federal Constitutional law does not depend upon, or implicate, any issues of Arizona Constitutional law. If, however, the Court finds otherwise, Defendants assert as an affirmative defense the Court's need for abstention, or certification of state questions on state constitutional law to the state court.

e. Plaintiffs lack standing to assert any claims that do not relate to alleged population deviations in the specific districts in which they reside.

f. Plaintiffs' claims present non-justiciable political questions. For example, the Supreme Court has not held that partisanship is an illegitimate state basis under the federal Constitution to justify population deviations of up to 10% in legislative redistricting. "Competitiveness," which necessarily requires looking at the balance of partisan interests in a district, is a legitimate state basis under the federal Constitution to justify population deviations of up to 10% in legislative redistricting.

g. Plaintiffs' claims are barred, in whole or in part, by their failure to state a claim upon which relief may be granted.

h. The Commission reserves the right to add any additional affirmative defenses that may be warranted by subsequent investigation and/or discovery in this case.

WHEREFORE, having fully answered Plaintiffs' Second Amended Complaint, the Commission requests that judgment be entered in its favor as follows:

1. That the Complaint be dismissed or denied, with Plaintiffs being entitled to no injunctive, declaratory, or other relief; and

2. For such further relief to which the Commission may be entitled or that the Court deems just and proper.

Appendix G

RESPECTFULLY SUBMITTED this 3rd day of December, 2012.

BALLARD SPAHR LLP

By: /s/ Joseph A. Kanefield
Joseph A. Kanefield (015838)
Brunn W. Roysden III (028698)

OSBORN MALEDON, P.A.

By: /s/ Jeffrey B. Molinar
Colin F. Campbell (004955)
Mary R. O'Grady (011434)
Jeffrey B. Molinar (018512)

Attorneys for the Arizona Independent Redistricting Commission and Commissioners Mathis, McNulty, Herrera, Freeman, and Stertz solely in their official capacities

APPENDIX H — ANSWER TO SECOND AMENDED COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED DECEMBER 3, 2012 BY DEFENDANT KEN BENNETT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Case No: CV12-0894-PHX-ROS

WESLEY W. HARRIS, *et al.*,

Plaintiffs,

vs.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Defendants.

SECRETARY OF STATE KEN BENNETT'S ANSWER TO SECOND AMENDED COMPLAINT

Defendant Ken Bennett, for his answer, admits and denies the allegations in Plaintiffs' Second Amended Complaint as follows. Any allegation not specifically admitted is denied.

1. With respect to paragraphs 1 and 2, Defendant Ken Bennett, the Arizona Secretary of State, takes no

position on the constitutionality of the Final Legislative Map created and adopted by the Arizona Independent Redistricting Commission ("IRC"). Secretary Bennett further takes no position on the allegations that the IRC violated section 2 of the Voting Rights Act. The statements set forth in these introductory paragraphs are argumentative rather than factual allegations. To that extent that any factual allegations are contained therein, they are not addressed to Secretary Bennett and therefore he neither admits nor denies them.

Secretary Bennett has been named to this lawsuit as a nominal party because of his responsibilities and duties associated with overseeing the statewide elections, including the upcoming 2012 congressional primary and general elections, which are scheduled to occur on August 28, 2012 and November 6, 2012 respectively. Secretary Bennett should be considered a nominal party for the purpose of attorneys' fees analysis and exempted from liability for attorneys' fees under A.R.S. § 12-348(H)(4). *See Bromley v. Arizona Dep't of Revenue*, 170 Ariz. 532, 539, 826 P.2d 1158, 1165 (App. 1991) (noting that nominal parties "lack any pecuniary or proprietary stake in the outcome of the action).

2. With respect to paragraph 3, Secretary Bennett admits the allegations contained therein, except as follows, based on a review of the information available to the Secretary of State in the voter registration records: Karen MacKean is registered under the name Karen MacKean-Foust.

3. With respect to paragraph 4, the allegations contained therein are not addressed to Secretary Bennett or his official responsibilities as the Arizona Secretary of State. Further, Secretary Bennett lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained therein. As such, he does not admit or deny those allegations.

4. With respect to paragraph 5, Secretary Bennett admits only that the provisions of the Arizona Constitution speak for themselves.

5. With respect to paragraphs 6 through 10, Secretary Bennett admits the allegations contained therein.

6. With respect to paragraphs 11 through 16, Secretary Bennett admits the allegations contained therein.

7. With respect to paragraphs 17 and 18, Secretary Bennett admits only that the campaign finance report attached as Exhibit 2 to the Complaint appears to be a true copy of the report maintained in the Secretary's Office.

8. With respect to paragraph 19, the allegations contained therein are not addressed to Secretary Bennett or his official responsibilities as the Arizona Secretary of State.

9. With respect to paragraph 20, Secretary Bennett admits the allegations contained therein.

10. With respect to paragraphs 21 through 63, the allegations contained therein are not addressed to Secretary Bennett or his official responsibilities as the Arizona Secretary of State. Further, Secretary Bennett lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained therein. As such, he does not admit or deny those allegations. Insofar as these paragraphs quote constitutional and statutory provisions, Secretary Bennett admits only that those authorities speak for themselves.

11. With respect to paragraphs 64 through 68, Secretary Bennett admits only that the provisions of the Arizona Constitution and the Arizona Supreme Court's opinion in *Arizona Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 208 P.3d 676 (2009) speak for themselves.

12. With respect to paragraphs 69 through 92, the allegations contained therein are not addressed to Secretary Bennett or his official responsibilities as the Arizona Secretary of State. Further, Secretary Bennett lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained therein. As such, he does not admit or deny those allegations.

13. With respect to paragraph 93, the allegations contained therein are not addressed to Secretary Bennett or his official responsibilities as the Arizona Secretary of State. The allegations contained therein regarding the attempt to remove Commissioner Mathis from office are a matter of public record and set forth in

the Arizona Supreme Court's Opinion in *Arizona Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 275 P.3d 1267 (2012). Secretary Bennett lacks sufficient knowledge or information to form a belief as to the truth of the allegations regarding the Governor's or Legislature's motivations regarding this matter. As such, he does not admit or deny those allegations.

14. With respect to paragraph 94, to the extent it is directed at the Governor's determination of the adequacy of Chairman Mathis' response, Secretary Bennett does not admit or deny the allegation. With regard to the other allegations, Secretary Bennett admits the allegations to the extent that, pursuant to Ariz. Const. Art. 5, § 6, in the absence of the Governor from the state, the elected Secretary acts as the Governor. On November 1, 2011, at the request of Governor Brewer, Secretary Bennett, while serving as Acting Governor, issued the letter of intent to remove Chairperson Mathis from the AIRC and called a special session of the Legislature for the purpose of obtaining concurrence from the Arizona Senate.

15. With respect to paragraphs 95 and 96, the allegations contained therein are not addressed to Secretary Bennett or his official responsibilities as the Arizona Secretary of State. The allegations contained therein regarding the attempt to remove Commissioner Mathis from office are a matter of public record and set forth in the Arizona Supreme Court's Opinion in *Arizona Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 275 P.3d 1267 (2012). Secretary Bennett lacks sufficient knowledge or information to form a belief as to the truth of the allegations regarding the Governor's or Legislature's

motivations regarding this matter. As such, he does not admit or deny those allegations.

16. With respect to paragraphs 97 through 138, the allegations contained therein are not addressed to Secretary Bennett or his official responsibilities as the Arizona Secretary of State. Further, Secretary Bennett lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained therein. As such, he does not admit or deny those allegations.

17. With respect to paragraph 139, admits only that the Department of Justice precleared the Final Legislative Map by letter dated April 26, 2012. The remaining allegations contained therein are not addressed to Secretary Bennett or his official responsibilities as the Arizona Secretary of State. Further, Secretary Bennett lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained therein. As such, he does not admit or deny those allegations.

18. With respect to paragraphs 140 through 171, the allegations contained therein are not addressed to Secretary Bennett or his official responsibilities as the Arizona Secretary of State. Further, Secretary Bennett lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained therein. As such, he does not admit or deny those allegations. However, Secretary Bennett further affirmatively states that he takes no position on the validity of lines contained within the Final Legislative Map or the process by which IRC created and adopted Final Legislative Map, nor on the merits of the claims made by the Plaintiffs.

WHEREFORE, Defendant Secretary Bennett prays for the following relief:

1. Prompt resolution of the issues concerning the validity and constitutionality of the Final Legislative Map such that the 2014 and subsequent elections shall proceed.

2. That Plaintiff and the IRC Defendants take *nothing* in the form of attorneys' fees or taxable costs from Defendant Secretary Bennett.

Respectfully submitted this 3rd day of December, 2012.

Thomas C. Horne
Attorney General

s/ Michele L. Forney
Michele L. Forney
Assistant Attorney General
Attorneys for Defendant Ken Bennett

APPENDIX I — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA, FILED APRIL 29, 2014

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CV-12-00894-PHX-ROS-NVW-RRC

WESLEY W. HARRIS, *et al.*,

Plaintiffs,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Defendant(s).

JUDGMENT IN A CIVIL CASE

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed April 29, 2014, judgment is entered in favor of defendant and against plaintiff. Plaintiff to take nothing, and complaint and action are terminated.

Appendix I

BRIAN D. KARTH
District Court Executive/Clerk

April 29, 2014

s/A. Smith
By: A. Smith, Deputy Clerk

APPENDIX J — TRANSCRIPT OF THE PROCEEDINGS OF THE ARIZONA INDEPENDENT REDISTRICTING COMMISSION, DATED DECEMBER 8, 2011

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Wednesday November 30, 2011
4:16 p.m.

Location

Fiesta Resort - Fiesta Ballroom
2100 South Priest Drive
Tempe, Arizona 85282

Attending

Colleen C. Mathis, Chair
Jose M. Herrera, Vice Chair
Linda C. McNulty, Commissioner
Richard P. Stertz, Commissioner

Ray Bladine, Executive Director
Buck Forst, Information Technology Specialist
Kristina Gomez, Deputy Executive Director
Stu Robinson, Public Information Officer

Mary O'Grady, Legal Counsel
Joe Kanefield, Legal Counsel
Bruce Adelson, Legal Counsel

Appendix J

Reported By:
Marty Herder, CCR
Certified Court Reporter #50162
www.CourtReportersAz.com

[2] **PROCEEDINGS**

(Whereupon, the public session commences.)

CHAIRPERSON MATHIS: Good afternoon. This meeting of the Arizona Independent Redistricting Commission will now come to order.

Today is Wednesday, November 30th, and the time is 4:16 p.m.

Please rise for the Pledge of Allegiance.

(Whereupon, the Pledge of Allegiance was recited.)

CHAIRPERSON MATHIS: Okay. We'll start with roll call.

Vice-Chair Freeman.

(No oral response.)

CHAIRPERSON MATHIS: Vice-Chair Herrera.

VICE-CHAIR HERRERA: Here.

CHAIRPERSON MATHIS: Commissioner McNulty.

COMMISSIONER McNULTY: Here.

CHAIRPERSON MATHIS: Commissioner Stertz.

COMMISSIONER STERTZ: Here.

CHAIRPERSON MATHIS: We have a quorum.

***

[38] COMMISSIONER STERTZ: Mr. Strasma, I appreciate the macroview of what happens district by district, but what I was more inclined to get some reference to is that when you take blocks out of -- as you're making adjustments to improve the ability to elect in a particular district and you're extracting a block and moving it to another district, not how that affects the overall district, but that block that you're extracting, as you may have described may have been an Anglo block, a Republican voting block, and looking at where that block is being moved to, what I'm, what I'm concerned about is that we're going -- we may be taking voters and moving them into a place where they have a -- they -- maybe packing into a larger Republican district where there is already a majority of Republicans might be a preference for that group to be input. It might be -- I'm trying to make sure that we're not disenfranchising any potential voters or any potential voter blocks as we're moving from one district to another.

VICE-CHAIR HERRERA: Madam Chair.

Appendix J

CHAIRPERSON MATHIS: Mr. Herrera.

VICE-CHAIR HERRERA: I think we all agree that the -- fulfilling the Voting Rights Act requirements trumps pretty much anything.

You know, let's be honest, that there is, that there is the Voting Rights Act that we need to meet.

[39] And if it means moving blocks of people to different districts, in a district that they - - that their vote may not be or their district may not be as competitive because we're putting more Democrats or Republicans in a district, then that's what we have to do.

I think we all agree that that -- that the Voting Rights Act is the number one thing that we need to comply with.

So these are just ideas that we're considering. We're not approving any of these. These are -- at this time.

We're asking Strategic Telemetry to make those changes and come back with a report that tells us, okay, we proposed these changes, you made those changes, so what was it -- how many of the districts that we changed but also the surrounding districts.

And I think we won't know that until they make those districts and come back with that information. And that will be, will be by tomorrow.

KENNETH STRASMA: If I may, Madam Chair, to expand on an earlier answer, if I understand correctly, Commissioner Stertz has two concerns. One that population that's moved may have an accidental and unnoticed impact. And that a separate question about you know given that impact, is it a change that we still want to make.

***

[129] STATE OF ARIZONA

ss.

COUNTY OF MARICOPA

BE IT KNOWN that the foregoing proceeding was taken before me, Marty Herder, a Certified Court Reporter, CCR No. 50162, State of Arizona; that the foregoing 128 pages constitute a true and accurate transcript of all proceedings had upon the taking of said meeting, all done to the best of my skill and ability.

DATED at Chandler, Arizona, this 8th day of December, 2011.

/s/_____

C. Martin Herder, CCR
Certified Court Reporter
Certificate No. 50162

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
SEP - 4 2015
OFFICE OF THE CLERK

No. 14-232

IN THE

Supreme Court of the United States

WESLEY W. HARRIS, *et al.*

Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT OF ARIZONA

SUPPLEMENTAL JOINT APPENDIX

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An Analysis of the Arizona Independent Redistricting Commission Legislative District Map*

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*A web appendix to this report can be found at j.mp/az-doj. The methods section of this report (Section 2) overlaps with that from our other report, "An Analysis of the Arizona Independent Redistricting Commission Congressional District Map".

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1 Introduction

We have been retained by the Arizona Independent Redistricting Commission to analyze data from the legislative district maps drawn for the 2011–2012 redistricting cycle and approved by the Commission. In this report, we estimate the extent of racially polarized voting, determine the identification and electability of the minority groups' candidates of choice, and (through a new method we introduce for the first time here) offer one way to evaluate whether stronger districts could have been drawn. We perform these analyses for both the benchmark map and proposed map, which allows for a judgment of whether the proposed map has a retrogressive effect. Our analyses are based on available quantitative information; much supplementary qualitative information will appear in other documents submitted by the Commission.

We have conducted extensive analyses of this redistricting plan, with a large number of individual runs. The main body of this report explains the methodology (Section 2) and then gives the results (Section 3). The appendix gives more results, and our web appendix (at `j.mp/az-doj`) gives much more extensive and detailed results.

Overall, we find that the new voting rights districts have similar levels of racially polarized voting between the baseline and new plans, although there are some differences across the state within each set of districts. On the basis of the quantitative information we have used, it seems straightforward to identify the candidate of choice of the Hispanic community in all but one district and the new districts would seem to have the ability to elect these candidates. We also find that it would be difficult, and unnecessary if it were possible, to draw districts more favorable to minorities. We see no evidence of retrogression.

2 Methodological Approach

In this section, we offer an overview of our methodological approach. We describe the modern methods of ecological inference used to avoid the problem that the secret bal-

lot creates when we attempt to make inferences about individual voting behavior from available data only about groups (Section 2.1).

2.1 Estimating Ethnic Group Voting Behavior: Ecological Inference

The goal of the present analysis is to provide evidence about the voting behavior of different ethnic groups. Direct evidence of this behavior is unavailable because of the secret ballot. Thus, we use modern methods of ecological inference to estimate (rather than determine) individual voting behavior from publicly available VTD-level (i.e., precinct) votes for each of the candidates from aggregated election results as well as population figures from the US Census. We summarize here the methods of ecological inference we use.

In 1953, two methods of ecological inference were introduced — the method of bounds (Duncan and Davis, 1953) and ecological regression (Goodman, 1953). A special case of the method of bounds is known as "homogeneous precinct analysis," which had been used in many court cases: this approach seeks out ethnically homogeneous precincts (100% black or 100% white, or 100% Hispanic) because for those precincts we know for certain the voting behavior of one ethnic group. The assumption behind this method is that the voting behavior observed in homogeneous precincts is identical to that in other areas. The advantage of this method is that it yields completely certain information about some subgroups of voters in some areas; the disadvantage is that the relatively few who live in homogeneous precincts may turnout in different numbers and vote for different candidates in starkly different ways than the vast majority of the population who live in (at least partially) heterogeneous areas. The method of bounds is more general than homogeneous precinct analysis because the former can also provide some information about heterogeneous precincts; it does this in the form of "bounds" or ranges into which the fraction of a minority group voting for a particular candidate must fall.

The second method of ecological inference – ecological regression – ignores the information revealed by the method of bounds and its special case of homogeneous precinct

analysis. Instead, ecological regression gathers hints from statistical information across all precincts. For example, if we find that in areas with more African Americans more votes are cast for the Democrats, then we may be willing to infer that it is the African Americans who are voting for the Democrats. The advantage of this approach is that it uses some information from all precincts. The disadvantage is that the information can be highly misleading: For example, also consistent with the same evidence would be that the (liberal) whites who live in areas with high African Americans concentrations are the ones who are producing more votes for the Democrats. In fact, as an indication of the common problems with this method, ecological regression, unlike the method of bounds, regularly gives impossible answers – such as estimating the percent of Hispanics voting for the Democrats as 160% or −54%.

The method of bounds (or homogeneous precinct analysis) and ecological regression dominated the academic literature and courtroom expert testimony from 1953 until 1997 when the approach known as EI was introduced (King, 1997). This approach was the first to combine the deterministic information from the method of bounds with the statistical information from ecological regression into a single set of estimates. Thus, it uses the statistical information from all precincts, the certain information from homogeneous precincts, and other deterministic information known for certain from other precincts (given in the form of ranges of estimates). Impossible estimates are never produced by this methodology, and all information from all precincts are used in the analysis. Like any indirect method of revealing information that the secret ballot hides, EI is also uncertain to a degree, but it uses more information than any other previous approach.

Since EI was introduced, a variety of other methods have been developed in the academic literature, virtually all of which follow King's practice of including deterministic and statistical information in the same model. For example, Rosen et al. (2001) extend King's method to arbitrarily large numbers of ethnic groups and candidates; we use this method in our work as well as King's original method. Some of these other methods have been collected in the edited volume by King, Rosen and Tanner (2004).

In practice, when we have data we can use to validate the methods, ecological regression and homogeneous precinct analysis tend to be fairly inaccurate in many situations. Studies have shown that uncertainty remains with King's and other subsequent methods, but the estimates are normally superior. Differences among the new methods that include both deterministic and statistical information are, in comparison, relatively minor.

In this case, we use these newer methods to give estimates of the proportion of each ethnic group that votes and, among those voting, the proportion who vote for each of the candidates. We also use King's "tomography plots" and other diagnostic methods that help us discern when adjustments in the methods need to be made, and how much uncertainty remains.

We also use the results from the ecological inference analysis here to measure what we call *district performance*, which is the percent of the voting age population which a given ethnic group needs in order to receive a specified share of the vote — in this case we use 50 or 55 percent as the specified thresholds. We do this under the assumption that voters in a racial group in the district will have the same voting behavior as voters in a racial group from adjacent districts. This directly measures what would happen if the district lines were redrawn in order to move minority voters into (or out of) a district of interest.

2.2 Measuring Voting Strength

To measure voting strength in the new districts, we follow the venerable practice of breaking down votes from available statewide races. In particular, we examined elections in the state of Arizona from 2004 through 2010. These include the 2004 US Presidential Election, 2006 Arizona Secretary of State Election, 2008 US Presidential Election, 2010 Arizona Mine Inspector Election and 2010 Arizona Secretary of State Election. All of these are state or national elections (known in voting rights parlance as "exogenous" elections); changes in district lines are unlikely to influence the vote choice of individual voters in these elections. Minority candidates ran for office in four of these five elections. Specif-

ically, Hispanic candidates served as the Democratic candidate in the 2006 Arizona Secretary of State Election and 2010 Arizona Mine Inspector Election; an African-American candidate served as the Democratic candidate in the 2008 US Presidential Election; a Native American was the Democratic candidate in the 2010 Secretary of State Election. The 2004 US Presidential Election did not include a minority candidate; however, as we show below, the Democratic Presidential candidate appears to be the clear candidate of choice for minority voters in most districts. Across all five elections, the candidate of choice for minority voters lost the statewide election.

Below, we present results for each election separately, as well as an average. As would be expected based on prior history of electoral returns in Arizona, and in other states, the results and our conclusions are fairly similar across these different statewide races.

2.3 An Explication of Sample Ecological Inference Results

We used our approach to ecological inference to determine the extent of racially polarized voting in Arizona as well as the electability of each district's candidate of choice among minority voters. For each legislative district in the existing (i.e., "benchmark") and proposed map, we estimated the turnout for each minority group and the proportion of each minority group's vote for each candidate.

To illustrate our approach, we describe the analysis for a single election occurring in a single legislative district. Thus, Table 1 displays estimates of how each racial group in the proposed Legislative District 2 voted in the 2010 election for Arizona Mine Inspector. Note that in each table the total population in the last column and the total votes in the last row are *observed* while the internal cells are *estimated* by our methodology. The bottom row labeled Total Pop gives the population vote totals computed by aggregating over all VTDs in the district. Similarly, the column labeled Total CVAP lists the share of citizen voting age population comprised by each racial group in the district. Again, this is calculated by simply aggregating over all VTDs in the district.

The internal cells in the table contain estimates from ecological inference. For exam-

Table 1: Mine Inspector 2010 LD 2 (Proposed)

Racial Group	Turnout	D Vote	R Vote	S Vote	Total CVAP
White	0.51	0.43	0.57	0.00	0.49
Hispanic	0.28	0.89	0.10	0.00	0.41
Native American	0.35	0.76	0.23	0.01	0.02
Black	0.18	0.52	0.47	0.01	0.04
Other	0.24	0.56	0.43	0.01	0.04
Total Pop	0.39	0.58	0.42	0.00	

ple, we estimate that 89% (0.89 in the table) of Hispanic citizens in LD 2 voted for the Democratic Candidate and 10% for the Republican candidate (and slightly more than 0% for any third party candidates). Furthermore, we know that Hispanics made up 41% of the district's total population (CVAP) and we estimate that they turned out for the election at a rate of 28%. Looking at the district as a whole, we observe that the Democratic candidate received 58% of the vote.

To judge the level of racial polarization in LD 2, we examine the differences in the voting patterns of whites and Hispanics. In this district, we estimate that the Democratic candidate received 43% of the vote among white voters; on the other hand, the Democrat received 89% of the vote among Hispanic voters. Because of this wide discrepancy along with the fact that the majority of white voters preferred a different candidate than the majority of Hispanic voters, we conclude that racially polarized voting exists in LD 2 for this election.

We now move to an analysis to determine the level of support among the main minority for the candidate of choice, as well as whether the district as a whole is strong enough to elect this candidate. In LD 2 the expected candidate of choice is the Democratic candidate, who is also Hispanic. The data appear to confirm this hypothesis, as 89% of Hispanic voters preferred the Democratic candidate. After judging the level of support for the candidate of choice, we turn to the district wide support for this candidate. In this case, we know that 58% of all voters in proposed LD 2 voted for the candidate of choice. This level of support appears to provide a comfortable margin of victory. Therefore, we conclude

that Hispanics in proposed LD 2 have a clear candidate of choice and furthermore that the district as a whole is likely to elect this candidate.

This example illustrates the method of analysis for a single race in a single district. We conducted this form of analysis for each district in each election of interest. In the sections that follow, we use our estimates for each district and election to assess the level of racial polarization and ability to elect the candidate of choice. The results presented here use the Citizen Voting Age Population (CVAP) totals. We present the same set of estimates using Voting Age Population (VAP) totals in the digital appendix. We have included tables illustrating the estimates for each district and each race in the appendix of this report.

2.4 Evaluating the Potential for Stronger Districts

A natural question to ask when examining any set of proposed districts is whether it is possible to draw districts even more favorable to the minority community without disrupting other essential redistricting criteria, such as one-person-one-vote or maintaining communities of interest. Specifically, we might wish to ask how much would one have to change the composition of a given district in order to meet certain target thresholds in terms of electoral performance? The best way to narrow uncertainty in answering a question like this is to actually draw a huge array of alternative redistricting plans and evaluate those. The Commission has evaluated many other redistricting plans, but given the nearly infinite number of possible districting plans that could be drawn and the nontrivial time and expense involved in drawing new plans, all possibilities can never be evaluated. Thus, we develop here (to our knowledge for the first time) a methodology that can serve as an aid in learning the answer to this question.

What we do is estimate how much a district's composition would have to change in order for the minority candidate of choice to gather 55% (or any other given percentage) of the overall voting strength in the district. To do this, we consider one minority district at a time and move minority or white voters between that district and its geographically

adjacent non-majority minority districts. In our version, we assume that district lines could be adjusted to draw specific types of voters into the districts of interest, no matter how strange the district lines. We thus ignore other redistricting criteria for this analysis. Thus, if our methodology indicates that it is possible to draw a stronger district, it does not mean that the Commission should adopt that districting plan. However, if we find that it is difficult or impossible to draw a stronger district (in the situation where a stronger district were desirable), then we can fairly confidently conclude that spending the time and money to draw new maps in an appropriate way that respects other crucial redistricting criteria would not wind up strengthening the district and so that possibility could be ignored.

We applied this approach to various actual plans and as the districts improved, the measures that we propose here reflected that. Now that the districts seem to have been improved as much as is feasible, it looks unlikely that they could be strengthened much further.

A more detailed outline of our procedure as follows:

1. First, use the methods of ecological inference described above to estimate the voting and turnout behavior for each racial group in every district.

2. For each minority district, determine the list of adjacent non-VRA districts.

3. Move voters between districts:

   (a) If the current total vote share for the candidate of choice is above (say) 55% in the minority district of interest, consider the counterfactual scenario in which the lines were re-drawn so as to remove one main minority voter from the current district and add one non-main minority voter from the adjacent districts.

   (b) If the current total vote share for the candidate of choice is below (say) 55% in the district of interest, we consider the counterfactual scenario in which the lines were re-drawn so as to remove one non-main minority voter from the current district and add one main minority voter from the adjacent district.

4. Recalculate the vote totals for each candidate and check whether the candidate of choice has reached a 55% threshold.

5. Repeat steps 3 and 4 until a 55% threshold has been reached, or until no more members of the group being removed from the current district are left in the district of interest.

The result of this procedure is the construction of a hypothetical district that meets the criteria of electing the candidate of choice by a comfortable margin. By comparing the characteristics of the district as it was with this hypothetically "redrawn" district, we gain an understanding of exactly how much the district would have to be reshaped in order meet a given standard. Furthermore, by examining the ratio of the change in vote share to the population change required to meet the threshold, we gain an idea of how efficient or feasible it would be to redraw the district in this manner. For example, if we have to increase the Hispanic population by 50% in order to gain a 5% boost for the candidate of choice, redrawing the district may not be worth it.

2.5 Sources of Uncertainty

There are several sources of uncertainty in these estimates including estimation uncertainty, fundamental uncertainty, and model dependence. *Estimation uncertainty* occurs because we have a limited set of observations (precincts) to use in estimating how each racial group votes. *Fundamental uncertainty* is the idea that even with a large amount of data there is some degree of randomness in the electoral process. A candidate runs an especially good campaign; the weather makes it difficult for one candidate's supporters to get to the polls; an outside group runs an effective set of attack ads; A scandal hits one of the candidates; this is the stuff of politics and it is modeled in a well-known way as fundamental variability. Finally, *model dependence* is the degree to which changes in modeling assumptions affect our estimates. Models are required in ecological inference because some information is destroyed in the process of aggregation and kept from the

analyst due to the secret ballot.

In different types of statistical problems, each of these sources of uncertainty can play differeffce roles and to differing degrees. Ecological inferences of course have all three sources of uncertainty, but as it happens, it is the model dependence caused by having to estimate voter preferences in the presence of the secret ballot that accounts for the overwhelming fraction of overall uncertainty. Model dependence dwarfs the other two components. Thus, we tune our methods of assessing uncertainty to focusing on model dependence.

To convey the degree of uncertainty in the estimates of turnout and vote share, we use "tomography plots" to accompany the tables. These plots give all information in the data without making any statistical modeling assumptions, as well as summarizing the available statistical information in the data. This enables us to evaluate directly how much information is available in the data and how much is imposed by the statistical model.

One entire tomography plot is needed for each numerical estimate in the corresponding table. For one example, the tomography plot in Figure 1 analyzes the information and uncertainty in the data and our analyses with respect to two unknowns: the percent of Whites (horizontally) and non-Whites (vertically) who vote for the Hispanic candidate in District 3, in each precinct. If these two quantities were known for a precinct, they would appear in the plot as a single dot, and the set of precincts as a set of dots. However, because of the secret ballot, we cannot know any of the exact points with precision: what the plot shows is that the information hidden from us by the secret ballot is directly quantifiable: it turns each precinct's dot into a line. We can think of the dot as being smeared into a line. That smearing represents a loss of information, but much information is retained (and that is uniquely captured by our methods of ecological inference). In particular, we know for certain that the true point representing the percent of whites and non-whites who vote for the Hispanic candidate falls somewhere on the line; we do not know where on the basis of just the information from that precinct, but we know it must be on the line.

For example, consider the bold green line in the plot. We know, based on the observed

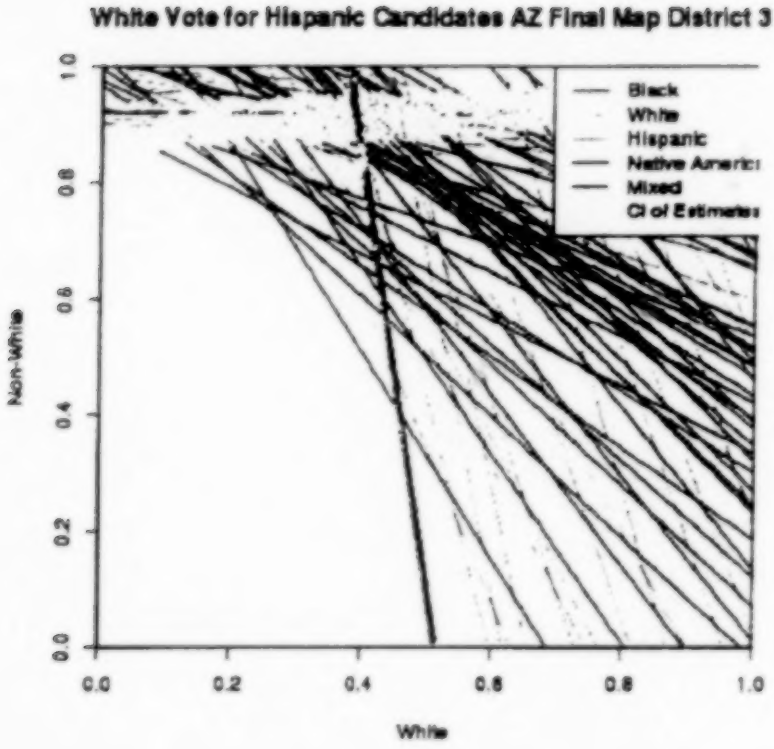

Figure 1: This tomography plot displays the white vote for the Hispanic Candidate in 2010 Mine Inspector Election

data from that precinct (the percent voting and the percent Hispanic), that the point in this plot (representing where the White and non-White vote share is) for this precinct must be some point on the line, but we do not know exactly where on the line this point falls. For this line, we know that the fraction of Whites that vote for the Hispanic candidate must fall somewhere between 0.42 (42 percent) and 0.52 (52 percent). We get these numbers by projecting the line downwards to the horizontal axis. If instead we project the line to the left (vertical) axis, we can see that, for this particular precinct, the range of possible values for the percent of non-Whites voting for the Hispanic candidate could be anywhere from 0% to 100%. That estimate is better than the method of ecological regression, which often gives answers outside that interval, but still we can see that this

precinct is informative with respect only to Whites, not non-Whites.

In this way, each line on a tomography plot captures exactly what we do and do not know about the voting behavior in each precinct — without any uncertainty (assuming only that the data are measured correctly). Our statistical method then uses all this available information as well as the statistical information from ecological regression. Lines that are relatively steep in this particular tomography plot convey a lot of information about the percent of Whites that vote for the Hispanic candidate. Lines that are relatively flat convey a great deal of information about the percent of non-Whites voting for the Hispanic candidate. Lines that cut off the top right or bottom left corner of the plot are informative about both quantities.

The tomography plots reflect what we know about the racial composition of each precinct. If a precinct contains more than 65% of a particular racial group (which we use as an arbitrary cutoff for graphical clarity), then the line on the tomography plot that corresponds to that precinct is color coded to represent the majority group (see the legend in the plot). If no groups comprise 65% or more of the precinct, then no color code is assigned.

Finally, the tomography plots also reflect the results of the ecological inference statistical estimation, that includes information on patterns across precincts. The point estimate (i.e., the exact point on the line that we estimate as the vote share for each group) as well as the confidence intervals are colored yellow. Taken together, these describe the overall estimate of how racial groups voted in the district as a whole. For example, in the tomography plot for District 3 in Figure 1, the mass of yellow in the top left part of the graph means that our estimates indicate that whites likely voted for the Hispanic candidate at a lower rate than did their non-white counterparts in the district.

As importantly, the tomography plots convey the *overall uncertainty* in the available data, and how our statistical estimator uses that information to produce an estimate. In this particular example, the prevalence of flat lines near the top and steep lines near the left convey a great deal of information about where and what we are uncertain about. The

statistical estimator assumes that there is some relationship among all the precincts in a district, and so in all likelihood there exists a cluster of points on the plot somewhere such that when two lines cross or approach one another, the true points on each are close to each other on their respective lines.

To appropriately and completely judge all sources of uncertainty in ecological inferences requires examining a plot like this for each numerical quantity to be estimated. The uncertainty estimates here are far more informative and information rich than sampling based confidence intervals or standard errors, which assume the model is true and only summarize fundamental and estimation uncertainty. Our appendix includes all such plots, calculated for all offices we analyzed, for VAP and CVAP, and for each district.

3 Results for the Legislative Plan

The benchmark legislative districts in the analysis are LDs 2, 13, 14, 15, 16, 23, 24, 25, 27, and 29. The proposed legislative districts in the analysis are LDs 2, 3, 4, 7, 19, 24, 26, 27, 29, and 30.

3.1 Racially Polarized Voting

We now assess the degree of racially polarized voting in both the benchmark and proposed districts. We do this with detailed tables in the appendix (and far more extensive ones in our web appendix), and a graphic summary of all of this information in this report.

We also offer here a summary of the vast array of results in a convenient set of graphs. First, Figure 2 displays the level of racially polarized voting across all races and also provides an easy graphical means of comparing racial polarization between the proposed and benchmark districts.

In each graph in this figure, the horizontal axis represents the main minority vote minus the majority (white) vote for each district. The first five graphs repeat the same analysis with different statewide races, and the bottom right graph summarizes the five

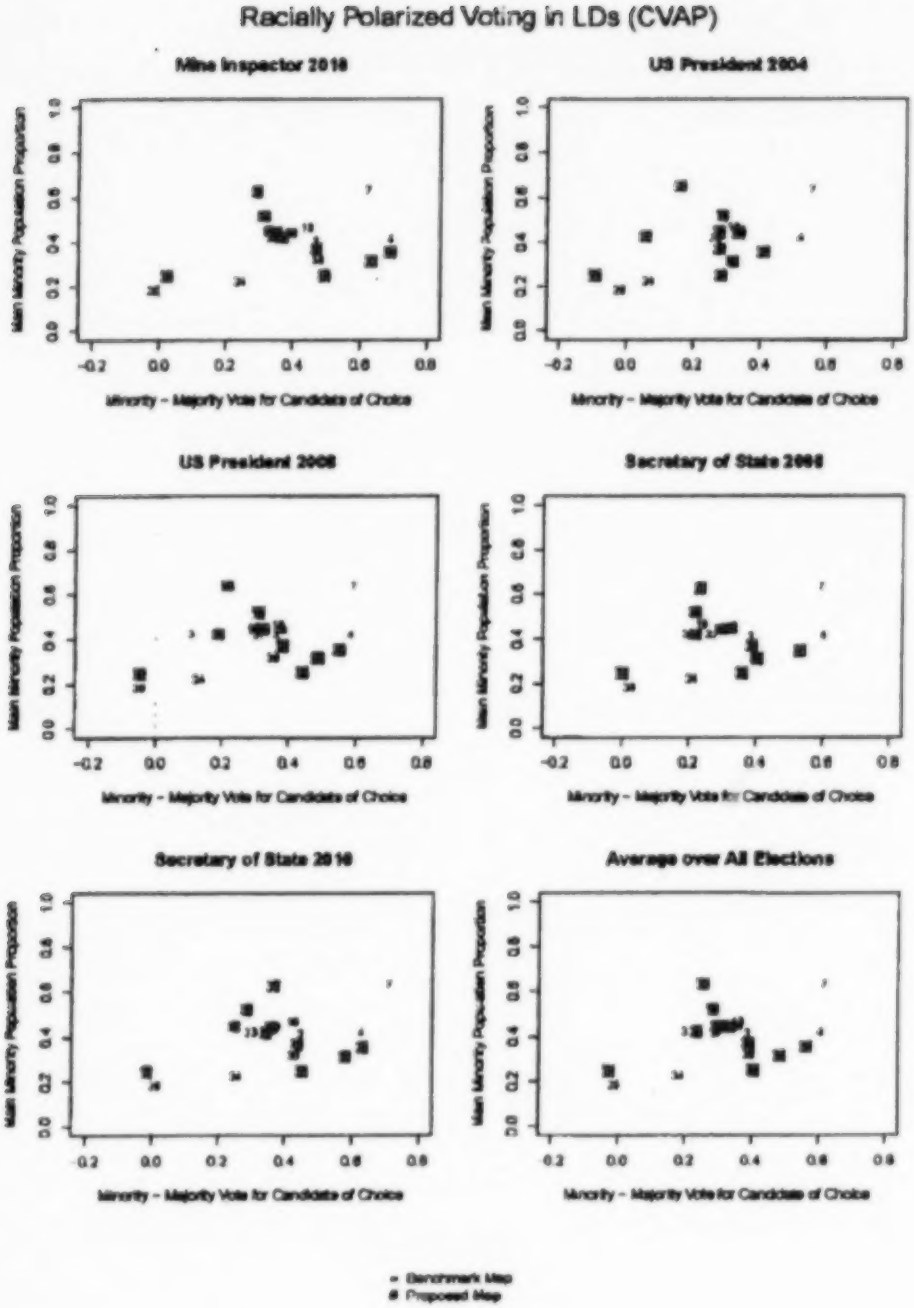

Figure 2: CVAP Legislative Districts

graphs by presenting an average. The similarity across the five graphs reflects the similarity in this aspect of voting patterns across the different statewide offices. In each of the graphs, the districts located farther to the right exhibit higher levels of racially polarized voting. The vertical axis tracks the share of the main minority population in each district. The orange squares represent the location of the benchmark districts while the blue numbers represent the proposed districts.

As the figure illustrates, the majority of legislative districts in both the benchmark and proposed LDs exhibit racially polarized voting across all races. However, there are some notable exceptions. According to our estimates, proposed LD 26 exhibits little racial polarization in the voting patterns. In fact, for several elections we estimate that the majority group voted for the minority candidate at a higher rate than did the main minority group. Similarly, benchmark LD 15 exhibited very similar behavior in terms of a lack of racially polarized voting.

Several other districts also exhibited lower levels of racial polarization depending on the election. Proposed LDs 2 and 24 exhibited relatively lower levels of polarization in the US President 2004 and US President 2008 elections. Benchmark LD 27 exhibited a noticeably lower level of racial polarization for the US President 2004 election. Nonetheless, as the graph displaying the average results over all five elections demonstrates, all districts but benchmark LD 15 and proposed LD 26 exhibited a level of polarized voting of close to at least 20%.

3.2 Electability of Candidate of Choice

Here we assess the electability of the candidate of choice in both the benchmark and proposed districts.

Figure 3 gives a graphical summary of our results; this figure is particularly crucial because it helps provide answers to the questions that are at the heart of whether the proposed districts are retrogressive or not. In particular, for each election the figure captures (1) the *estimated* level of support among the main minority group in each legislative dis-

trict candidate for the candidate of choice; (2) the *observed* electability of the candidate of choice in each legislative district (in the given statewide elections); and, (3) the degree to which the proposed districts represent improvement or retrogression along dimensions 1 and 2.

Again, each graph in Figure 3 performs an analysis based on a different statewide office, with the average appearing in the bottom right. In each, the horizontal axis captures the estimated (two-party) vote share for the candidate of choice among the main minority population. The vertical axis represents the observed (two-party) vote share for the candidate of choice among all voters in the district. When a district falls in the top right quadrant of a graph it means that that (1) the main minority in the district prefers the candidate of choice and (2) the district as a whole would have elected the candidate of choice.

First, we examine the benchmark districts. Across all elections, we note that benchmark LDs 23, 24 and 25 demonstrate support for the candidate of choice among the main minority group; however, none of these districts ever actually "elect" the candidate of choice in the broken down statewide races. This is evident from the graphs because these three districts fall in the bottom right quadrant rather than the top right quadrant in each graph. Other than these three districts, the remaining benchmark LDs exhibit the ability to elect the candidate of choice. Of course, the absolute difference is small, and a good campaign or an especially good set of candidates may well produce a different outcome. The only issue is that in benchmark LD 15 it is sometimes not clear if the expected candidate of choice is strongly preferred by the main minority group. For example, in the US President 2004 election, we estimate that Hispanics in LD 15 voted for the Democratic candidate at a rate of 53%, which is by no means overwhelming support for the candidate of choice.

Moving to an analysis of the proposed LDs, the most important thing to note is that no districts perform as consistently poorly in terms of ability to elect the candidate of choice as do benchmark LDs 23, 24, and 25. In fact, averaging across all elections it is clear that

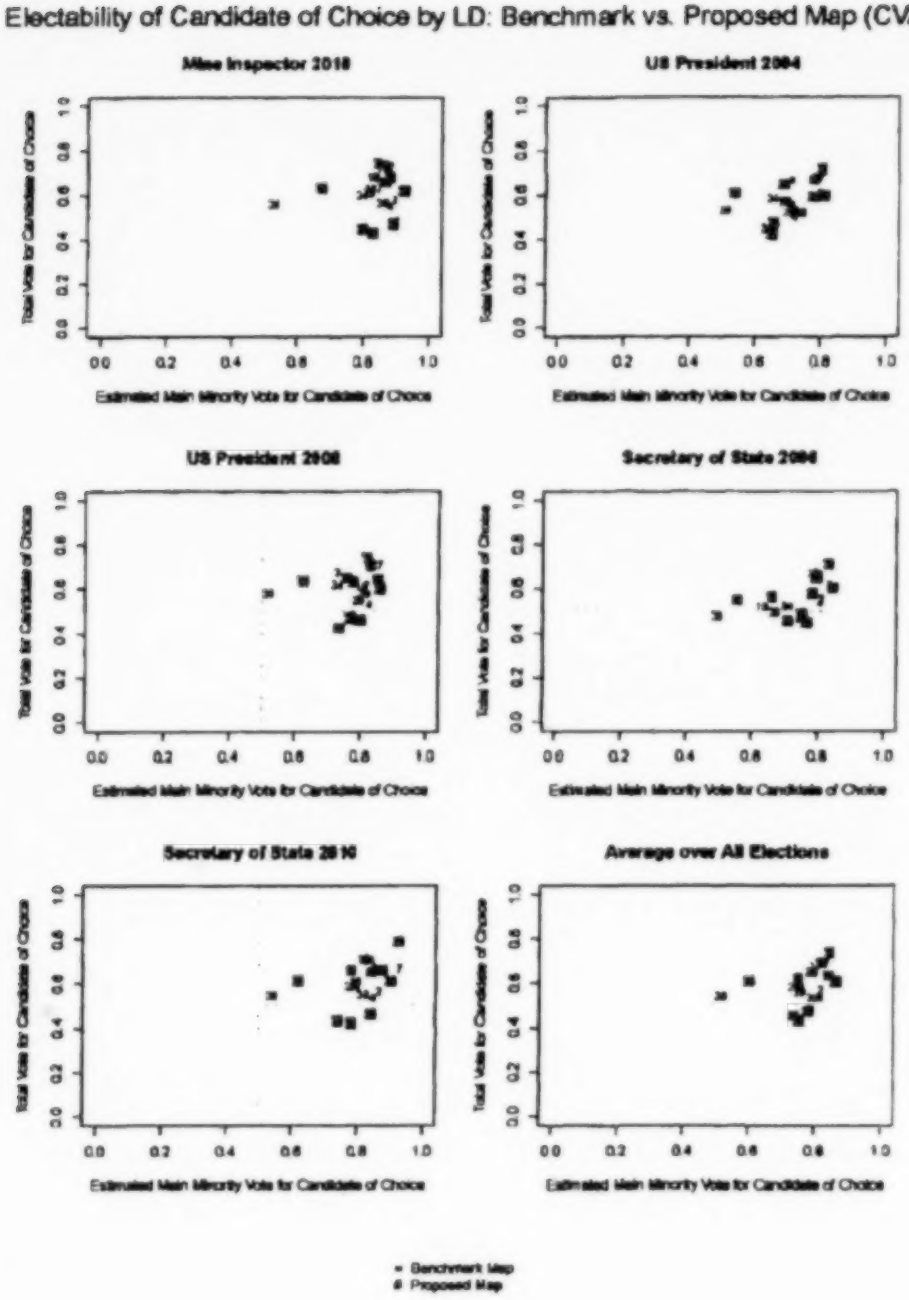

Figure 3: CVAP Legislative Districts

all proposed LDs fall in the upper right hand quadrant. Furthermore, all proposed LDs other than LD 26 demonstrate that there is clear main minority support for the candidate of choice in each election. Other than LD 26, the lowest estimated level of support for the candidate of choice among the main minority group is in LD 19, where Hispanic voters voted for the Democratic candidate for Secretary of State in 2006 at an estimated rate of 60%.

In terms of ability to elect the candidate of choice, the proposed LDs also outperform the benchmark LDs. On average, all districts vote for the candidate of choice at a rate that is substantially higher than in benchmark LDs 23, 24, or 25. Of the five elections we examined, only in the election for Secretary of State 2006 did the overall ability to elect the candidate of choice seem to be in question in more than one district. But even in this case the districts outperformed the benchmark LDs.

LD 26 is clearly the one proposed district for which both the support for the candidate of choice among the main minority group as well as the overall ability to elect comes into question. There are several factors at play in LD 26 worth keeping in mind. First, we have estimated that there is a low level of polarized voting between Hispanic and white voters in the district. Furthermore, because of the nature of the district, our estimates based on ecological inference are relatively uncertain in LD 26. Figure 4 helps illustrate the issue. It displays the tomography plot for the Hispanic vote for the Hispanic Democratic candidate in the 2010 Mine Inspector Election. The horizontal axis displays the vote share for this candidate among Hispanic voters.

Because of the combination of voting patterns along with a relatively small Hispanic population (CVAP), there is a high degree of uncertainty in the estimates for this district. As the tomography plot illustrates, most of the lines are horizontal, which means there is very little concrete information that we can infer about how Hispanic voters are voting. In fact, without performing any inference and making any assumptions, we can only say that the bound on vote share for the Hispanic candidate among Hispanic voters is somewhere between 0 and 1 — that is, we have no certain information at all. While this plot is just

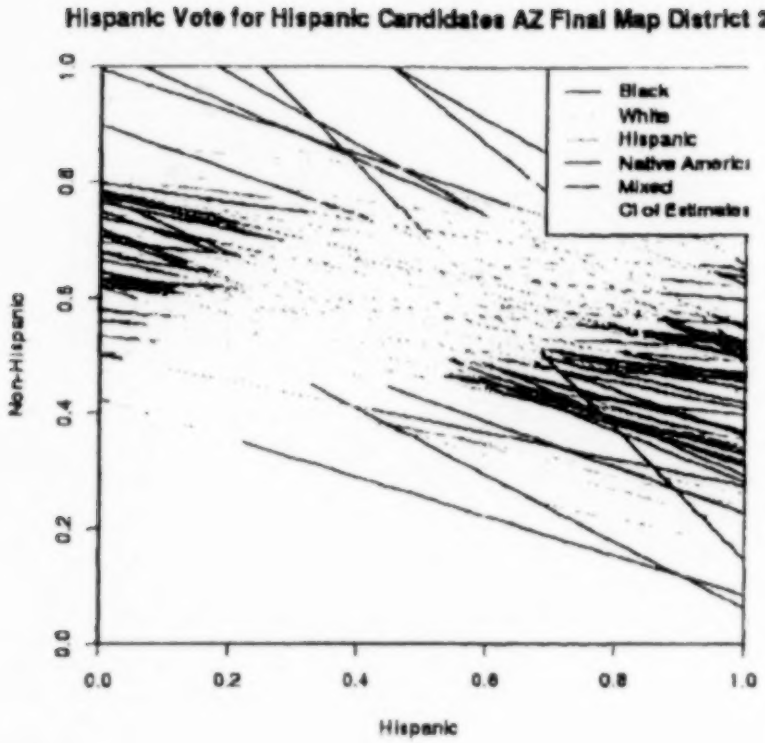

Figure 4: This tomography plot displays the Hispanic vote for the Hispanic Candidate in 2010 Mine Inspector Election

for the Mine Inspector election, the tomography plots for other elections in LD 26 are very similar. A key point is that this lack of information indicates nothing bad about how the district was drawn; it is merely a consequence of the secret ballot in combination with how voters are sorted among the electoral precincts. In particular, the uncertainty surrounding the estimates for LD 26 arise from the combination of relatively low levels of racial polarization with a relatively even distribution of Hispanic voters throughout the precincts of the legislative district. These circumstances lead to the difficulties in pinning down the voting patterns of Hispanic voters in a precise manner.

Based on the empirical evidence available, we conclude that LD 26 does not appear to exhibit polarized voting between whites and Hispanics; furthermore, the level of support

among Hispanic voters for the expected candidate of choice (i.e., the candidate who is an ethnic minority or who appears to be the preferred choice of minority groups) is not clear. As mentioned above, this is not a problem with how the district has been drawn. Despite the caveats, however, the minority candidate still wins in LD 26 in four of the five elections that we examine. The same cannot be said about three of the ten benchmark districts.

We also include in the Appendix the analysis for proposed LD 8. LD 8 is not considered an ability to elect district, but it nonetheless represents an improvement over the benchmark district from the same geographic area, LD 23. In four of the five elections that we examine, proposed LD 8 performs as well or better than benchmark LD 23. The one exception is in the US President 2008 Election when it performs worse by a single percentage point. While neither proposed LD 8 nor benchmark LD 23 reach a 50% threshold for the candidate of choice in any of the elections examined, LD 8 comes within a few percentage points of the threshold repeatedly.

3.3 Could Stronger Districts Have been Drawn?

While the analysis in the previous section revealed that the proposed districts demonstrate a greater ability to elect the candidate of choice than the benchmark districts, we still hope to learn whether even stronger districts could have been drawn. The *performance analysis* that we described above helps answer this question.

Figure 5 summarizes the results from running the performance analysis for each district and election. The full results are available in our web appendix. The horizontal axis in the figure is the change in Hispanic population share required to reach the 55% threshold for the candidate of choice. If a district is plotted to the left of the origin (i.e., left of the vertical dashed line at zero), then initially the district vote totals for the candidate of choice were greater than the 55% threshold and so we envision what would occur if we removed Hispanic voters from the district. If the district is plotted to the right of the origin, then initially the district vote totals for the candidate of choice were less than the

55% threshold and so we envision what would occur if we added Hispanic voters to the district.

In some cases, even if we examine the counterfactual in which we have changed the composition of the district as much as possible (for example, constructing a district that contains 0% or 100% Hispanics) it is still not possible to reach the target threshold. This would occur for example in a district where the candidate of choice receives fewer than 55% of the vote, and even Hispanic voters in the neighboring districts do not favor the candidate of choice. These cases are denoted in red in Figure 5, and they suggest that it would be difficult to strengthen these districts.

The vertical axis represents the ratio of vote share change to population change. This is essentially a measure of "bang for the buck". It tells us the relative amount that we had to alter the composition of the district in order to gain an additional percentage point in vote for the candidate of choice. Thus, a district that is located relatively higher on the vertical axis is one for which changes in the composition of the district result in relatively more changes in voting patterns.

Starting with the Mine Inspector 2010 graph in the upper left hand corner, we see that most districts were already above the 55% threshold. The US President 2004 graph is more interesting; we estimate that for several districts – LD 19, 26, and 29 – it would not be possible to raise the overall vote share for the candidate of choice to 55% by tweaking the district lines. The same is true of several districts when we examine the Secretary of State 2006 election.

The graphs also provide useful information about how difficult it would be to strengthen any districts that appeared weaker in the previous analysis. These graphs do not give any reason to suggest that altering the lines of LD 26 would be an effective way to strengthen the district under anything close to the current redistricting plan, that is while respecting other important redistricting criteria. (This is exacerbated by the fact, discussed above, that LD 26 happens to provide relatively uncertain ecological inferences to begin with.) In two of the five elections, we estimate that it would be impossible to strengthen LD

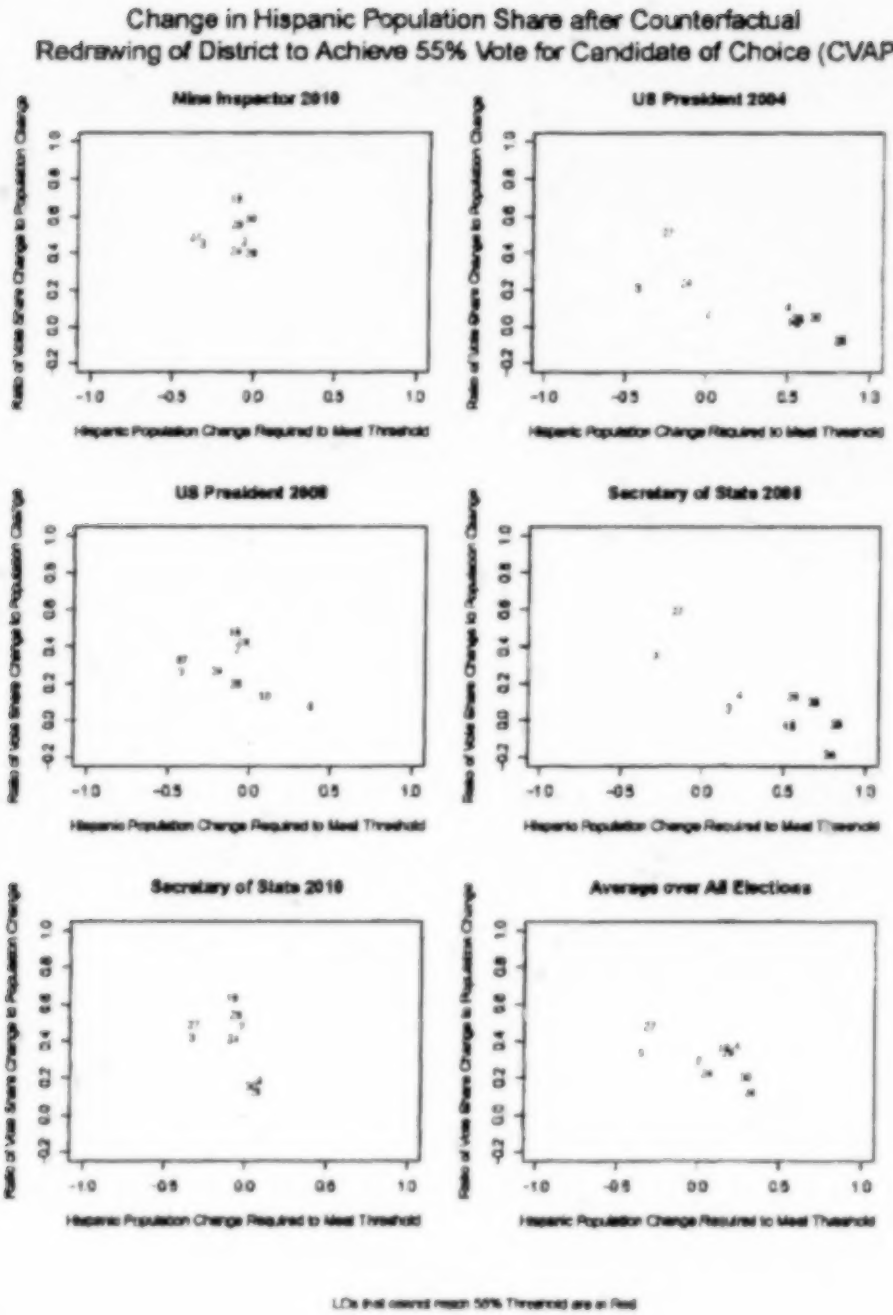

Figure 5: CVAP Legislative Districts

26 sufficiently to reach a 55% threshold for the candidate of choice while drawing from adjacent non-VRA districts. In the remaining three elections, the efficiency of redrawing LD 26 appears relatively low. Specifically, we estimate that relatively large changes in the composition of the district would have to occur in order to sufficiently shore up support for the candidate of choice. This is perhaps best illustrated by the graph displaying the average result over all elections. In this graph, LD 26 has the lowest ratio of vote share change to population change required of any of the minority districts.

Plan: Leg_grid_option2

Population Summary Report

DISTRICT	POPULATION	DEVIATION	% DEVN.
1	214,326	1,259	0.59
2	213,650	583	0.27
3	211,705	-1,362	-0.64
4	216,240	3,173	1.49
5	207,722	-5,345	-2.51
6	213,078	11	0.01
7	214,766	1,699	0.80
8	214,912	1,845	0.87
9	213,797	730	0.34
10	211,448	-1,619	-0.76
11	213,593	526	0.25
12	212,943	-124	-0.06
13	211,927	-1,140	-0.54
14	209,601	-3,466	-1.63
15	212,767	-300	-0.14
16	216,157	3,090	1.45
17	215,123	2,056	0.96
18	212,275	-792	-0.37
19	216,386	3,320	1.56
20	213,710	643	0.30
21	213,322	256	0.12
22	212,643	-424	-0.20
23	213,240	173	0.08
24	211,223	-1,844	-0.87
25	212,025	-1,042	-0.49
26	212,295	-772	-0.36
27	210,628	-2,439	-1.14
28	215,420	2,353	1.10
29	213,400	333	0.16
30	211,684	-1,383	-0.65

Total Population	6,392,017
Ideal District Population	213,067
Deviation Statistics	
Population Range	207,722 to 216,396
Ratio Range	1.04
Absolute Range	-5,345 to 3,329
Absolute Overall Range	8,674.00
Relative Range	-2.51% to 1.56%
Relative Overall Range	4.07%
Absolute Mean Deviation	1,470.30
Relative Mean Deviation	0.69%
Standard Deviation	1,950.38

Change report: Final_Leg_Districts_compared_to_Plaintiffs_Plan_X

OLD MAP : FINAL_LEGISLATIVE_DISTRICTS-BLOCK_EQUIVALENCY
NEW MAP : AZ_LEG_SAMPLE_PLAN_X
DISTRICTS CHAN 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 & 30

POPULATION - Final_Leg_Districts_compared_to_Plaintiffs_Plan_X

1	Deviation from Ideal Populatio	3,383	1.6%	-296	-0.1%	-3,679	-1.7%
1	NH White	181,967	84.1%	178,223	83.8%	-3,744	-0.3%
1	Hispanic	24,035	11.1%	23,957	11.3%	-78	0.2%
1	NH Native-American	1,789	0.8%	1,789	0.8%	0	0.0%
1	NH African-American	1,913	0.9%	1,929	0.9%	16	0.0%
1	Total minority	34,484	15.9%	34,548	16.2%	64	0.3%
1	18+ NH White	147,538	86.7%	143,616	86.4%	3,922	-0.3%
1	18+ Hispanic	15,190	8.9%	15,098	9.1%	-92	0.2%
1	18+ NH Native American	1,386	0.8%	1,381	0.8%	-5	0.0%
1	18+ African-American	1,457	0.9%	1,463	0.9%	6	0.0%
1	18+ total minority	22,598	13.3%	22,553	13.6%	-45	0.3%
1	Hispanic CVAP	9,112	6.2%	9,165	6.5%	53	0.2%
1	Hispanic Registration	6,004	4.8%	5,996	4.9%	-8	0.1%
1	2004 Prop 200 Yes	37,196	58.9%	37,243	58.9%	47	0.0%
1	2004 President Dem	23,113	34.8%	23,120	34.8%	7	0.0%
1	2006 Sec of St Dem	17,267	30.7%	17,269	30.6%	2	0.0%
1	2008 President Dem	33,645	34.0%	32,536	33.9%	-1,109	-0.1%
1	2010 Mine Dem	22,349	29.7%	21,585	29.7%	-764	0.0%

2	Deviation from Ideal Populatio	-8,452	-4.0%	-7	0.0%	8,445	4.0%
2	NH White	69,116	33.8%	71,153	33.4%	2,037	-0.4%
2	Hispanic	121,900	59.6%	127,164	59.7%	5,264	0.1%
2	NH Native-American	2,702	1.3%	2,621	1.2%	-81	-0.1%
2	NH African-American	5,909	2.9%	6,508	3.1%	599	0.2%
2	Total minority	135,499	66.2%	141,907	66.6%	6,408	0.4%
2	18+ NH White	60,416	40.6%	62,609	40.3%	2,193	-0.2%
2	18+ Hispanic	78,653	52.8%	81,994	52.8%	3,341	0.0%
2	18+ NH Native American	1,933	1.3%	1,862	1.2%	-71	-0.1%
2	18+ African-American	4,539	3.0%	4,919	3.2%	380	0.1%
2	18+ total minority	88,509	59.4%	92,662	59.7%	4,153	0.2%
2	Hispanic CVAP	45,508	41.1%	49,165	40.9%	3,657	-0.2%
2	Hispanic Registration	32,576	39.1%	33,610	38.8%	1,034	-0.3%
2	2004 Prop 200 Yes	21,517	46.2%	22,955	45.3%	1,438	-0.9%
2	2004 President Dem	26,898	55.1%	29,856	56.2%	2,958	1.1%
2	2006 Sec of St Dem	20,629	54.6%	22,812	55.6%	2,183	1.0%
2	2008 President Dem	33,278	56.8%	35,729	58.1%	2,451	1.3%
2	2010 Mine Dem	26,222	56.7%	27,966	58.1%	1,744	1.4%

3	Deviation from Ideal Populatio	-8,454	-4.0%	84	0.0%	8,538	4.0%

3	NH White	67,222	32.9%	67,598	31.7%	376	-1.1%
3	Hispanic	115,569	56.5%	122,950	57.7%	7,381	1.2%
3	NH Native-American	7,611	3.7%	8,069	3.8%	458	0.1%
3	NH African-American	6,053	3.0%	6,366	3.0%	313	0.0%
3	Total minority	137,391	67.1%	145,554	68.3%	8,163	1.1%
3	18+ NH White	60,946	39.4%	61,063	38.2%	117	-1.2%
3	18+ Hispanic	77,451	50.1%	82,160	51.3%	4,709	1.3%
3	18+ NH Native American	5,111	3.3%	5,431	3.4%	320	0.1%
3	18+ African-American	4,632	3.0%	4,850	3.0%	218	0.0%
3	18+ total minority	93,799	60.6%	98,993	61.8%	5,194	1.2%
3	Hispanic CVAP	55,904	43.1%	58,762	43.7%	2,858	0.6%
3	Hispanic Registration	33,812	41.8%	35,658	42.7%	1,846	0.9%
3	2004 Prop 200 Yes	23,162	39.2%	24,145	39.6%	983	0.4%
3	2004 President Dem	41,158	66.2%	42,212	65.9%	1,054	-0.3%
3	2006 Sec of St Dem	26,231	67.3%	27,043	67.2%	812	-0.1%
3	2008 President Dem	40,355	67.2%	41,077	66.9%	722	-0.4%
3	2010 Mine Dem	30,182	69.1%	30,868	68.9%	686	-0.2%

4	Deviation from Ideal Populatio	-8,924	-4.2%	-281	-0.1%	8,643	4.1%
4	NH White	58,192	28.5%	61,044	28.7%	2,852	0.2%
4	Hispanic	123,594	60.5%	129,372	60.8%	5,778	0.3%
4	NH Native-American	11,559	5.7%	11,593	5.4%	34	-0.2%
4	NH African-American	5,891	2.9%	5,522	2.6%	-369	-0.3%
4	Total minority	145,951	71.5%	151,742	71.3%	5,791	-0.2%
4	18+ NH White	47,013	33.2%	49,515	33.5%	2,502	0.3%
4	18+ Hispanic	78,816	55.7%	82,617	55.9%	3,801	0.2%
4	18+ NH Native American	7,926	5.6%	7,960	5.4%	34	-0.2%
4	18+ African-American	4,529	3.2%	4,300	2.9%	-229	-0.3%
4	18+ total minority	94,472	66.8%	98,330	66.5%	3,858	-0.3%
4	Hispanic CVAP	42,790	42.9%	44,082	43.0%	1,292	0.1%
4	Hispanic Registration	32,725	43.0%	34,087	42.5%	1,362	-0.5%
4	2004 Prop 200 Yes	18,654	53.0%	20,343	54.8%	1,689	1.8%
4	2004 President Dem	18,803	50.1%	19,113	48.3%	310	-1.9%
4	2006 Sec of St Dem	13,763	53.5%	14,205	51.6%	442	-1.9%
4	2008 President Dem	23,430	52.0%	23,623	50.1%	193	-1.9%
4	2010 Mine Dem	17,496	54.5%	17,741	52.7%	245	-1.8%

5	Deviation from Ideal Populatio	5,972	2.8%	-403	-0.2%	-6,375	-3.0%
5	NH White	172,081	78.6%	165,048	77.6%	-7,033	-1.0%
5	Hispanic	34,316	15.7%	33,848	15.9%	-468	0.2%
5	NH Native-American	4,609	2.1%	5,771	2.7%	1,162	0.6%
5	NH African-American	1,822	0.8%	1,826	0.9%	4	0.0%
5	Total minority	46,959	21.4%	47,616	22.4%	657	1.0%
5	18+ NH White	143,620	82.2%	140,552	81.6%	-3,068	-0.6%
5	18+ Hispanic	22,009	12.6%	21,827	12.7%	-182	0.1%
5	18+ NH Native American	3,291	1.9%	4,020	2.3%	729	0.5%
5	18+ African-American	1,424	0.8%	1,430	0.8%	6	0.0%

5	18+ total minority	31,081	17.8%	31,617	18.4%	536	0.6%
5	Hispanic CVAP	14,425	9.1%	14,421	9.2%	-4	0.1%
5	Hispanic Registration	9,046	7.3%	9,018	7.4%	-28	0.1%
5	2004 Prop 200 Yes	36,694	64.5%	37,208	64.7%	514	0.3%
5	2004 President Dem	22,170	35.7%	22,642	36.1%	472	0.4%
5	2006 Sec of St Dem	15,374	33.8%	15,643	33.9%	269	0.1%
5	2008 President Dem	23,887	33.3%	24,006	33.6%	119	0.3%
5	2010 Mine Dem	14,623	27.2%	14,741	27.7%	118	0.5%

6	Deviation from ideal Populatio	1,176	0.6%	304	0.1%	-872	-0.4%
6	NH White	159,161	74.3%	158,582	74.3%	-579	0.0%
6	Hispanic	33,176	15.5%	33,059	15.5%	-117	0.0%
6	NH Native American	13,062	6.1%	12,925	6.1%	-137	0.0%
6	NH African-American	2,004	0.9%	1,992	0.9%	-12	0.0%
6	Total minority	55,083	25.7%	54,790	25.7%	-293	0.0%
6	18+ NH White	132,925	78.2%	132,487	78.2%	-438	0.0%
6	18+ Hispanic	21,327	12.5%	21,252	12.6%	-75	0.0%
6	18+ NH Native American	9,210	5.4%	9,100	5.4%	-110	0.0%
6	18+ African-American	1,639	1.0%	1,631	1.0%	-8	0.0%
6	18+ total minority	37,040	21.8%	36,831	21.8%	-209	0.0%
6	Hispanic CVAP	11,868	8.0%	11,826	8.0%	-42	0.0%
6	Hispanic Registration	7,641	6.6%	7,602	6.6%	-39	0.0%
6	2004 Prop 200 Yes	45,264	52.4%	45,034	52.4%	-230	0.0%
6	2004 President Dem	42,883	46.8%	42,686	46.8%	-197	0.0%
6	2006 Sec of St Dem	28,255	42.2%	28,068	42.2%	-187	0.0%
6	2008 President Dem	42,101	45.5%	41,874	45.5%	-227	0.0%
6	2010 Mine Dem	27,548	41.1%	27,371	41.1%	-177	0.0%

7	Deviation from ideal Populatio	-10,041	-4.7%	46	0.0%	10,087	4.7%
7	NH White	50,373	24.8%	59,843	28.1%	9,470	3.3%
7	Hispanic	13,878	6.8%	15,380	7.2%	1,502	0.4%
7	NH Native American	133,830	65.9%	132,826	62.3%	-1,004	-3.6%
7	NH African-American	914	0.5%	934	0.4%	20	0.0%
7	Total minority	152,653	75.2%	153,271	71.9%	618	-3.3%
7	18+ NH White	40,013	28.7%	45,189	31.2%	5,176	2.5%
7	18+ Hispanic	8,545	6.1%	9,415	6.5%	870	0.4%
7	18+ NH Native American	87,851	63.1%	87,245	60.3%	-606	-2.8%
7	18+ African-American	778	0.6%	791	0.5%	13	0.0%
7	18+ total minority	99,246	71.3%	93,577	68.8%	331	-2.5%
7	Hispanic CVAP	6,450	4.7%	6,617	4.7%	167	0.0%
7	Hispanic Registration	4,745	4.1%	4,924	4.1%	179	0.0%
7	2004 Prop 200 Yes	27,266	53.6%	27,593	53.3%	327	-0.2%
7	2004 President Dem	35,347	60.2%	35,388	59.4%	41	-0.8%
7	2006 Sec of St Dem	25,582	61.4%	25,729	61.0%	147	-0.5%
7	2008 President Dem	39,172	60.5%	39,584	59.6%	412	-0.9%
7	2010 Mine Dem	32,166	63.0%	32,460	61.4%	294	-1.6%

8	Deviation from Ideal Populatio	-4,645	-2.2%	330	0.2%	4,975	2.3%
8	NH White	104,152	50.0%	117,764	55.2%	13,612	5.2%
8	Hispanic	72,456	34.8%	62,003	29.1%	-10,453	-5.7%
8	NH Native-American	14,534	7.0%	14,391	6.7%	-143	-0.2%
8	NH African-American	9,211	4.4%	10,609	5.0%	1,398	0.6%
8	Total minority	104,270	50.0%	95,634	44.8%	-8,636	-5.2%
8	18+ NH White	81,918	53.4%	88,184	58.3%	6,266	4.9%
8	18+ Hispanic	48,030	31.3%	39,762	26.3%	-8,268	-5.0%
8	18+ NH Native American	10,829	7.1%	10,671	7.1%	-158	0.0%
8	18+ African-American	7,014	4.6%	7,437	4.9%	423	0.3%
8	18+ total minority	71,487	46.6%	63,005	41.7%	-8,482	-4.9%
8	Hispanic CVAP	32,245	30.5%	26,897	24.6%	-5,348	-5.8%
8	Hispanic Registration	19,113	23.0%	16,008	18.3%	-3,105	-4.7%
8	2004 Prop 200 Yes	18,330	53.9%	14,202	54.9%	-4,128	1.0%
8	2004 President Dem	16,331	45.3%	12,312	44.9%	-4,019	-0.4%
8	2006 Sec of St Dem	14,263	46.8%	11,457	44.5%	-2,806	-2.2%
8	2008 President Dem	23,068	44.3%	23,480	43.6%	412	-0.8%
8	2010 Mine Dem	17,428	46.3%	15,442	42.3%	-1,986	-4.0%

9	Deviation from Ideal Populatio	156	0.1%	153	0.1%	-3	0.0%
9	NH White	146,025	68.5%	148,384	69.6%	2,359	1.1%
9	Hispanic	46,661	21.9%	45,021	21.1%	-1,640	-0.8%
9	NH Native-American	2,065	1.0%	1,959	0.9%	-106	0.0%
9	NH African-American	5,917	2.8%	5,546	2.6%	-371	-0.2%
9	Total minority	67,199	31.5%	64,837	30.4%	-2,362	-1.1%
9	18+ NH White	125,635	73.0%	126,968	73.9%	1,333	0.9%
9	18+ Hispanic	31,504	18.3%	30,395	17.7%	-1,109	-0.6%
9	18+ NH Native American	1,550	0.9%	1,473	0.9%	-77	0.0%
9	18+ African-American	4,346	2.5%	4,057	2.4%	-289	-0.2%
9	18+ total minority	46,485	27.0%	44,804	26.1%	-1,681	-0.9%
9	Hispanic CVAP	23,354	14.1%	22,935	13.8%	-419	-0.3%
9	Hispanic Registration	10,801	9.5%	10,895	9.4%	94	-0.1%
9	2004 Prop 200 Yes	44,058	46.5%	44,873	47.0%	815	0.5%
9	2004 President Dem	53,137	53.5%	52,734	52.6%	-403	-0.8%
9	2006 Sec of St Dem	36,089	50.0%	36,175	49.3%	86	-0.7%
9	2008 President Dem	54,115	54.5%	54,061	53.6%	-54	-0.9%
9	2010 Mine Dem	37,977	51.4%	38,065	50.5%	88	-0.8%

10	Deviation from Ideal Populatio	-1,994	-0.9%	-125	-0.1%	1,869	0.9%
10	NH White	138,868	65.8%	145,094	68.1%	6,226	2.3%
10	Hispanic	49,128	23.3%	44,662	21.0%	-4,466	-2.3%
10	NH Native-American	1,807	0.9%	1,655	0.8%	-152	-0.1%
10	NH African-American	9,556	4.5%	9,497	4.5%	-59	-0.1%
10	Total minority	72,205	34.2%	67,848	31.9%	-4,357	-2.3%
10	18+ NH White	117,413	70.5%	121,722	72.4%	4,309	1.9%
10	18+ Hispanic	32,487	19.5%	29,535	17.6%	-2,952	-1.9%
10	18+ NH Native American	1,339	0.8%	1,258	0.7%	-81	-0.1%

10	18+ African-American	7,195	4.3%	7,222	4.3%	27	0.0%
10	18+ total minority	49,226	29.5%	46,395	27.6%	-2,831	-1.9%
10	Hispanic CVAP	26,172	15.9%	23,742	14.5%	-2,430	-1.4%
10	Hispanic Registration	12,948	11.5%	12,136	10.6%	-812	-0.9%
10	2004 Prop 200 Yes	44,175	48.7%	46,070	49.4%	1,895	0.7%
10	2004 President Dem	48,763	51.2%	49,164	50.2%	401	-1.0%
10	2006 Sec of St Dem	33,934	48.8%	33,884	47.7%	-50	-1.1%
10	2008 President Dem	50,663	51.9%	51,061	51.0%	398	-0.9%
10	2010 Mine Dem	36,103	49.5%	36,193	48.4%	90	-1.1%

11	Deviation from Ideal Populatio	309	0.1%	218	0.1%	-91	0.0%
11	NH White	145,091	68.0%	134,153	62.9%	-10,938	-5.1%
11	Hispanic	48,249	22.6%	60,401	28.3%	12,152	5.7%
11	NH Native American	3,108	1.5%	3,309	1.6%	201	0.1%
11	NH African-American	7,160	3.4%	6,007	2.8%	-1,153	-0.5%
11	Total minority	68,286	32.0%	79,133	37.1%	10,847	5.1%
11	18+ NH White	117,449	73.3%	111,790	68.1%	-5,659	-5.2%
11	18+ Hispanic	29,474	18.4%	38,561	23.5%	9,087	5.1%
11	18+ NH Native American	2,131	1.3%	2,304	1.4%	173	0.1%
11	18+ African-American	4,935	3.1%	4,683	2.9%	-252	-0.2%
11	18+ total minority	42,808	26.7%	52,381	31.9%	9,573	5.2%
11	Hispanic CVAP	19,747	14.7%	25,448	19.2%	5,701	4.4%
11	Hispanic Registration	12,890	11.2%	16,092	14.6%	3,202	3.4%
11	2004 Prop 200 Yes	33,514	57.3%	35,675	56.6%	2,161	-0.7%
11	2004 President Dem	25,310	41.2%	27,711	41.9%	2,401	0.6%
11	2006 Sec of St Dem	19,912	39.6%	21,363	41.1%	1,451	1.5%
11	2008 President Dem	36,784	41.9%	35,401	42.0%	-1,383	0.1%
11	2010 Mine Dem	26,250	38.4%	27,221	40.3%	971	1.9%

12	Deviation from Ideal Populatio	8,667	4.1%	384	0.2%	-8,283	-3.9%
12	NH White	162,476	73.3%	155,751	73.0%	-6[illegible]5	-0.3%
12	Hispanic	34,578	15.6%	31,978	15.0%	-2,600	-0.6%
12	NH Native American	1,385	0.6%	1,430	0.7%	45	0.0%
12	NH African-American	6,797	3.1%	6,665	3.1%	-132	0.1%
12	Total minority	59,259	26.7%	57,701	27.0%	-1,558	0.3%
12	18+ NH White	111,743	75.6%	109,256	75.4%	-2,487	-0.3%
12	18+ Hispanic	20,504	13.9%	19,241	13.3%	-1,263	-0.6%
12	18+ NH Native American	930	0.6%	965	0.7%	35	0.0%
12	18+ African-American	4,497	3.0%	4,486	3.1%	-11	0.1%
12	18+ total minority	36,011	24.4%	35,692	24.6%	-319	0.3%
12	Hispanic CVAP	15,949	12.4%	15,268	11.9%	-681	-0.5%
12	Hispanic Registration	11,151	9.2%	10,790	8.9%	-361	-0.3%
12	2004 Prop 200 Yes	34,677	61.4%	32,568	61.2%	-2,109	-0.3%
12	2004 President Dem	19,334	31.9%	18,563	32.4%	-771	0.5%
12	2006 Sec of St Dem	12,598	28.3%	12,241	28.8%	-357	0.5%
12	2008 President Dem	28,826	34.7%	30,326	36.2%	1,500	1.6%
12	2010 Mine Dem	15,842	30.1%	16,449	31.4%	607	1.3%

13	Deviation from Ideal Populatio	-1,366	-0.6%	-171	-0.1%	1,195	0.6%
13	NH White	126,954	60.0%	131,333	61.7%	4,379	1.7%
13	Hispanic	66,106	31.2%	60,939	28.6%	-5,167	-2.6%
13	NH Native-American	1,757	0.8%	1,721	0.8%	-36	0.0%
13	NH African-American	7,530	3.6%	8,911	4.2%	1,381	0.6%
13	Total minority	84,747	40.0%	81,563	38.3%	-3,184	-1.7%
13	18+ NH White	103,306	65.9%	105,708	67.6%	2,402	1.6%
13	18+ Hispanic	40,759	26.0%	36,940	23.6%	-3,819	-2.4%
13	18+ NH Native American	1,363	0.9%	1,332	0.9%	-31	0.0%
13	18+ African-American	5,333	3.4%	6,213	4.0%	880	0.6%
13	18+ total minority	53,344	34.1%	50,697	32.4%	-2,647	-1.6%
13	Hispanic CVAP	23,429	19.6%	21,898	18.4%	-1,531	-1.1%
13	Hispanic Registration	16,111	17.0%	14,908	15.5%	-1,203	-1.4%
13	2004 Prop 200 Yes	28,718	67.2%	27,189	66.9%	-1,529	-0.3%
13	2004 President Dem	15,370	33.9%	14,722	34.1%	-648	0.2%
13	2006 Sec of St Dem	10,944	32.4%	10,238	32.1%	-706	-0.3%
13	2008 President Dem	22,039	35.0%	22,968	35.8%	929	0.9%
13	2010 Mine Dem	14,635	31.4%	14,862	31.7%	227	0.3%

14	Deviation from Ideal Populatio	4,625	2.2%	-7	0.0%	-4,632	-2.2%
14	NH White	132,552	60.9%	129,628	60.8%	-2,924	0.0%
14	Hispanic	67,082	30.8%	65,875	30.9%	-1,207	0.1%
14	NH Native-American	1,851	0.9%	1,861	0.9%	10	0.0%
14	NH African-American	7,070	3.2%	6,875	3.2%	-195	0.0%
14	Total minority	85,141	39.1%	83,432	39.2%	-1,709	0.0%
14	18+ NH White	105,951	65.0%	104,327	65.0%	-1,624	0.0%
14	18+ Hispanic	43,999	27.0%	43,467	27.1%	-532	0.1%
14	18+ NH Native American	1,479	0.9%	1,489	0.9%	10	0.0%
14	18+ African-American	5,448	3.3%	5,309	3.3%	-139	0.0%
14	18+ total minority	57,061	35.0%	56,253	35.0%	-808	0.0%
14	Hispanic CVAP	32,188	22.7%	31,470	22.8%	-718	0.2%
14	Hispanic Registration	21,231	17.4%	20,813	17.5%	-418	0.0%
14	2004 Prop 200 Yes	39,005	57.5%	36,874	57.4%	-2,131	-0.1%
14	2004 President Dem	26,288	37.0%	25,031	37.2%	-1,257	0.2%
14	2006 Sec of St Dem	20,625	38.7%	19,710	39.0%	-915	0.3%
14	2008 President Dem	30,123	36.9%	29,317	37.0%	-806	0.1%
14	2010 Mine Dem	23,784	37.2%	23,258	37.3%	-526	0.1%

15	Deviation from Ideal Populatio	1,873	0.9%	-316	-0.1%	-2,189	-1.0%
15	NH White	172,110	80.1%	162,784	76.5%	-9,326	-3.6%
15	Hispanic	22,035	10.3%	28,828	13.6%	6,793	3.3%
15	NH Native-American	1,359	0.6%	1,793	0.8%	434	0.2%
15	NH African-American	4,086	1.9%	5,035	2.4%	949	0.5%
15	Total minority	42,831	19.9%	49,967	23.5%	7,136	3.6%
15	18+ NH White	133,974	82.4%	129,531	79.6%	-4,443	-2.8%
15	18+ Hispanic	13,970	8.6%	18,101	11.1%	4,131	2.5%

15	18+ NH Native American	973	0.6%	1,270	0.8%	297	0.2%
15	18+ African-American	3,037	1.9%	3,706	2.3%	669	0.4%
15	18+ total minority	28,606	17.6%	33,166	20.4%	4,561	2.8%
15	Hispanic CVAP	10,166	6.9%	11,833	8.0%	1,667	1.1%
15	Hispanic Registration	6,931	5.4%	7,220	5.9%	289	0.5%
15	2004 Prop 200 Yes	45,281	60.5%	47,74[illegible]	60.3%	2,464	-0.1%
15	2004 President Dem	29,938	37.3%	32,887	38.7%	2,949	1.5%
15	2006 Sec of St Dem	17,753	31.0%	18,164	32.3%	411	1.3%
15	2008 President Dem	36,837	39.3%	36,379	41.7%	-458	2.4%
15	2010 Mine Dem	21,510	34.2%	21,028	36.2%	-482	2.0%

16	Deviation from Ideal Populatio	7,089	3.3%	-325	-0.2%	-7,414	-3.5%
16	NH White	169,113	76.8%	163,045	76.6%	-6,068	-0.2%
16	Hispanic	36,222	16.5%	34,668	16.3%	-1,554	-0.2%
16	NH Native-American	1,776	0.8%	1,669	0.8%	-107	0.0%
16	NH African-American	4,816	2.2%	5,004	2.4%	188	0.2%
16	Total minority	51,044	23.2%	49,697	23.4%	-1,347	0.2%
16	18+ NH White	133,781	81.2%	127,629	80.9%	-6,152	-0.3%
16	18+ Hispanic	21,337	13.0%	20,447	13.0%	-890	0.0%
16	18+ NH Native American	1,260	0.8%	1,183	0.8%	-77	0.0%
16	18+ African-American	3,353	2.0%	3,425	2.2%	72	0.1%
16	18+ total minority	30,938	18.8%	30,041	19.1%	-897	0.3%
16	Hispanic CVAP	13,387	9.2%	13,022	9.5%	-365	0.3%
16	Hispanic Registration	9,765	8.6%	9,507	8.7%	-258	0.1%
16	2004 Prop 200 Yes	41,566	63.9%	38,924	63.9%	-2,642	0.0%
16	2004 President Dem	25,426	36.5%	23,680	36.3%	-1,746	-0.2%
16	2006 Sec of St Dem	15,659	34.6%	14,527	34.4%	-1,132	-0.2%
16	2008 President Dem	28,930	38.1%	27,786	37.7%	-1,144	-0.3%
16	2010 Mine Dem	17,780	33.8%	17,042	33.5%	-738	-0.3%

17	Deviation from Ideal Populatio	8,106	3.8%	-86	0.0%	-8,192	-3.8%
17	NH White	140,660	63.6%	134,167	63.0%	-6,493	-0.6%
17	Hispanic	47,472	21.5%	46,681	21.9%	-791	0.5%
17	NH Native-American	2,221	1.0%	2,210	1.0%	-11	0.0%
17	NH African-American	9,238	4.2%	9,164	4.3%	-74	0.1%
17	Total minority	80,514	36.4%	78,814	37.0%	1,700	0.6%
17	18+ NH White	110,213	68.1%	105,976	67.6%	-4,237	-0.5%
17	18+ Hispanic	29,525	18.2%	29,169	18.6%	-356	0.4%
17	18+ NH Native American	1,515	0.9%	1,531	1.0%	16	0.0%
17	18+ African-American	6,526	4.0%	6,479	4.1%	-47	0.1%
17	18+ total minority	51,722	31.9%	50,832	32.4%	-890	0.5%
17	Hispanic CVAP	20,229	14.1%	20,113	14.5%	-116	0.4%
17	Hispanic Registration	12,770	10.5%	12,432	10.8%	-338	0.2%
17	2004 Prop 200 Yes	38,712	59.5%	41,127	58.9%	2,415	-0.5%
17	2004 President Dem	27,851	39.7%	30,398	40.5%	2,547	0.8%
17	2006 Sec of St Dem	17,448	35.1%	18,948	35.6%	1,500	0.4%
17	2008 President Dem	39,162	43.3%	38,029	44.0%	-1,133	0.6%

17	2010 Mine Dem	22,098	38.1%	21,665	38.8%	-433	0.7%

18	Deviation from Ideal Populatio	5,609	2.6%	222	0.1%	-5,387	-2.5%
18	NH White	153,658	70.3%	145,201	68.1%	-8,457	-2.2%
18	Hispanic	31,641	14.5%	33,743	15.8%	2,102	1.4%
18	NH Native-American	3,190	1.5%	3,732	1.7%	542	0.3%
18	NH African-American	10,190	4.7%	11,230	5.3%	1,040	0.6%
18	Total minority	65,019	29.7%	68,089	31.9%	3,070	2.2%
18	18+ NH White	124,070	73.4%	118,600	71.6%	-5,470	-1.8%
18	18+ Hispanic	21,459	12.7%	22,873	13.8%	1,414	1.1%
18	18+ NH Native American	2,280	1.3%	2,699	1.6%	419	0.3%
18	18+ African-American	7,413	4.4%	8,091	4.9%	678	0.5%
18	18+ total minority	44,896	26.6%	47,066	28.4%	2,170	1.8%
18	Hispanic CVAP	18,319	11.1%	18,614	11.5%	295	0.4%
18	Hispanic Registration	11,703	8.5%	11,406	8.7%	-297	0.2%
18	2004 Prop 200 Yes	49,175	52.7%	45,551	51.5%	-3,624	-1.2%
18	2004 President Dem	46,464	46.5%	45,654	48.1%	-810	1.6%
18	2006 Sec of St Dem	27,032	40.2%	26,132	41.3%	-900	1.1%
18	2008 President Dem	53,041	49.4%	51,517	51.0%	-1,524	1.6%
18	2010 Mine Dem	31,664	45.4%	30,789	46.8%	-875	1.4%

19	Deviation from Ideal Populatio	-5,979	-2.8%	268	0.1%	6,247	2.9%
19	NH White	45,004	21.7%	46,284	21.7%	1,280	0.0%
19	Hispanic	134,862	65.1%	139,454	65.4%	4,592	0.2%
19	NH Native-American	2,350	1.1%	2,339	1.1%	-11	0.0%
19	NH African-American	16,061	7.8%	16,296	7.6%	235	-0.1%
19	Total minority	162,084	78.3%	167,052	78.3%	4,968	0.0%
19	18+ NH White	35,275	26.4%	36,290	26.4%	1,015	0.0%
19	18+ Hispanic	80,622	60.4%	83,145	60.6%	2,523	0.2%
19	18+ NH Native American	1,639	1.2%	1,590	1.2%	-49	-0.1%
19	18+ African-American	10,325	7.7%	10,453	7.6%	128	-0.1%
19	18+ total minority	98,274	73.6%	100,973	73.6%	2,699	0.0%
19	Hispanic CVAP	47,169	47.5%	47,549	47.8%	380	0.3%
19	Hispanic Registration	28,730	41.3%	29,566	41.2%	836	0.0%
19	2004 Prop 200 Yes	15,868	54.3%	16,672	54.6%	804	0.3%
19	2004 President Dem	16,322	52.8%	16,980	52.6%	658	-0.2%
19	2006 Sec of St Dem	9,946	51.8%	10,466	51.9%	520	0.2%
19	2008 President Dem	23,710	60.8%	24,447	60.7%	737	-0.1%
19	2010 Mine Dem	15,964	62.8%	16,500	62.7%	536	-0.1%

20	Deviation from Ideal Populatio	5,099	2.4%	-387	-0.2%	-5,486	-2.6%
20	NH White	148,114	67.9%	143,598	67.5%	-4,516	-0.4%
20	Hispanic	46,856	21.5%	44,632	21.0%	-2,224	-0.5%
20	NH Native-American	2,947	1.4%	2,743	1.3%	-204	-0.1%
20	NH African-American	8,325	3.8%	8,837	4.2%	512	0.3%
20	Total minority	70,053	32.1%	69,082	32.5%	-971	0.4%
20	18+ NH White	120,748	72.5%	115,928	71.8%	-4,820	-0.7%

20	18+ Hispanic	29,476	17.7%	28,189	17.5%	-1,287	-0.2%
20	18+ NH Native American	2,102	1.3%	1,975	1.2%	-127	0.0%
20	18+ African-American	6,029	3.6%	6,423	4.0%	394	0.4%
20	18+ total minority	45,822	27.5%	45,530	28.2%	-292	0.7%
20	Hispanic CVAP	21,418	13.0%	22,271	13.6%	853	0.6%
20	Hispanic Registration	12,284	10.3%	12,981	11.1%	697	0.8%
20	2004 Prop 200 Yes	49,320	60.3%	42,962	60.4%	-6,358	0.1%
20	2004 President Dem	35,708	41.0%	30,789	40.5%	-4,919	-0.4%
20	2006 Sec of St Dem	19,386	34.6%	17,639	34.2%	-1,747	-0.4%
20	2008 President Dem	34,834	42.7%	32,964	41.1%	-1,870	-1.6%
20	2010 Mine Dem	21,409	39.7%	20,187	38.7%	-1,222	-1.0%

21	Deviation from Ideal Populatio	3,174	1.5%	404	0.2%	-2,770	-1.3%
21	NH White	143,644	66.4%	141,249	66.2%	-2,395	-0.3%
21	Hispanic	53,053	24.5%	52,806	24.7%	-247	0.2%
21	NH Native American	1,562	0.7%	1,555	0.7%	-7	0.0%
21	NH African American	8,819	4.1%	8,792	4.1%	-27	0.0%
21	Total minority	72,598	33.6%	72,223	33.8%	-375	0.3%
21	18+ NH White	119,158	72.4%	117,007	72.1%	-2,151	-0.3%
21	18+ Hispanic	32,423	19.7%	32,275	19.9%	-148	0.2%
21	18+ NH Native American	1,098	0.7%	1,091	0.7%	-7	0.0%
21	18+ African-American	6,140	3.7%	6,120	3.8%	-20	0.0%
21	18+ total minority	45,530	27.6%	45,299	27.9%	-231	0.3%
21	Hispanic CVAP	20,698	15.3%	20,677	15.5%	-21	0.2%
21	Hispanic Registration	15,959	13.7%	15,868	13.8%	-91	0.1%
21	2004 Prop 200 Yes	40,541	60.7%	39,749	60.7%	-792	-0.1%
21	2004 President Dem	28,666	40.0%	28,156	40.0%	-510	0.0%
21	2006 Sec of St Dem	18,274	34.8%	18,209	34.8%	-65	0.0%
21	2008 President Dem	33,902	41.6%	33,443	41.6%	-459	0.1%
21	2010 Mine Dem	21,672	38.1%	21,382	38.2%	-290	0.1%

22	Deviation from Ideal Populatio	2,844	1.3%	44	0.0%	-2,800	-1.3%
22	NH White	175,513	81.3%	175,136	82.2%	-377	0.9%
22	Hispanic	22,375	10.4%	20,426	9.6%	-1,949	-0.8%
22	NH Native American	839	0.4%	796	0.4%	-43	0.0%
22	NH African-American	5,822	2.7%	5,426	2.5%	-396	0.2%
22	Total minority	40,399	18.7%	37,976	17.8%	-2,423	-0.9%
22	18+ NH White	141,890	84.6%	140,567	85.4%	-1,323	0.8%
22	18+ Hispanic	13,708	8.2%	12,425	7.6%	-1,283	-0.6%
22	18+ NH Native American	586	0.3%	559	0.3%	-27	0.0%
22	18+ African-American	4,149	2.5%	3,849	2.3%	-300	-0.1%
22	18+ total minority	25,798	15.4%	23,943	14.6%	-1,855	-0.8%
22	Hispanic CVAP	9,911	7.1%	8,993	6.6%	-918	-0.5%
22	Hispanic Registration	7,804	6.0%	7,289	5.6%	-515	-0.3%
22	2004 Prop 200 Yes	46,238	62.9%	45,060	63.1%	-1,178	0.2%
22	2004 President Dem	29,142	37.0%	28,039	36.7%	-1,103	-0.3%
22	2006 Sec of St Dem	20,500	30.7%	19,713	30.4%	-787	-0.2%

22	2008 President Dem	36,693	36.7%	36,213	36.5%	-480	-0.3%
22	2010 Mine Dem	22,817	31.7%	22,657	31.5%	-160	-0.2%

23	Deviation from Ideal Populatio	383	0.2%	-36	0.0%	-419	-0.2%
23	NH White	186,190	87.2%	186,991	87.8%	801	0.5%
23	Hispanic	12,212	5.7%	11,497	5.4%	-715	-0.3%
23	NH Native American	1,616	0.8%	1,508	0.7%	-108	0.0%
23	NH African-American	2,833	1.3%	2,679	1.3%	-154	-0.1%
23	Total minority	27,261	12.8%	26,040	12.2%	-1,221	-0.5%
23	18+ NH White	156,821	89.0%	157,273	89.5%	452	0.5%
23	18+ Hispanic	8,631	4.9%	8,095	4.6%	-536	-0.3%
23	18+ NH Native American	1,189	0.7%	1,103	0.6%	-86	0.0%
23	18+ African-American	2,284	1.3%	2,169	1.2%	-115	-0.1%
23	18+ total minority	19,450	11.0%	18,527	10.5%	-923	-0.5%
23	Hispanic CVAP	6,694	3.9%	6,314	3.7%	-380	-0.2%
23	Hispanic Registration	4,606	3.1%	4,339	2.9%	-267	-0.2%
23	2004 Prop 200 Yes	56,934	57.4%	54,989	57.7%	-1,945	0.3%
23	2004 President Dem	42,527	39.3%	40,224	38.7%	-2,303	-0.6%
23	2006 Sec of St Dem	24,824	31.6%	23,972	31.3%	-852	-0.3%
23	2008 President Dem	47,278	40.4%	46,619	39.6%	-659	-0.8%
23	2010 Mine Dem	27,588	33.6%	27,285	32.8%	-303	-0.9%

24	Deviation from Ideal Populatio	-6,408	-3.0%	126	0.1%	6,534	3.1%
24	NH White	92,695	44.9%	121,536	57.0%	28,841	12.2%
24	Hispanic	85,381	41.3%	59,271	27.8%	-26,110	-13.5%
24	NH Native American	6,716	3.2%	6,506	3.1%	-210	-0.2%
24	NH African-American	13,046	6.3%	12,427	5.8%	-619	-0.5%
24	Total minority	113,964	55.1%	91,658	43.0%	-22,306	-12.2%
24	18+ NH White	82,855	52.4%	107,774	62.3%	24,919	9.9%
24	18+ Hispanic	53,875	34.1%	39,719	23.0%	-14,156	-11.1%
24	18+ NH Native American	4,861	3.1%	4,809	2.8%	-52	-0.3%
24	18+ African-American	9,883	6.3%	9,699	5.6%	-184	-0.6%
24	18+ total minority	75,129	47.6%	65,106	37.7%	-10,023	-9.9%
24	Hispanic CVAP	30,860	22.8%	23,517	15.5%	-7,343	-7.3%
24	Hispanic Registration	15,329	16.6%	12,364	11.9%	2,965	-4.8%
24	2004 Prop 200 Yes	29,970	50.8%	33,811	49.0%	3,841	-1.8%
24	2004 President Dem	36,734	58.5%	41,403	56.0%	4,669	-2.5%
24	2006 Sec of St Dem	21,582	52.2%	23,489	48.9%	1,907	-3.3%
24	2008 President Dem	38,568	61.6%	43,213	59.0%	4,645	-2.6%
24	2010 Mine Dem	24,987	59.7%	26,476	55.1%	1,489	-4.6%

25	Deviation from Ideal Populatio	7,727	3.6%	-342	-0.2%	-8,069	-3.8%
25	NH White	160,255	72.6%	163,001	76.6%	2,746	4.0%
25	Hispanic	43,023	19.5%	34,976	16.4%	-8,047	-3.0%
25	NH Native American	3,655	1.7%	2,331	1.1%	-1,324	-0.6%
25	NH African-American	5,837	2.6%	4,701	2.2%	-1,136	-0.4%
25	Total minority	60,540	27.4%	49,724	23.4%	-10,816	-4.0%

25	18+ NH White	129,933	77.4%	131,404	80.6%	1,471	3.3%
25	18+ Hispanic	26,254	15.6%	21,553	13.2%	-4,701	-2.4%
25	18+ NH Native American	2,399	1.4%	1,596	1.0%	-803	-0.4%
25	18+ African-American	4,217	2.5%	3,450	2.1%	-767	-0.4%
25	18+ total minority	38,011	22.6%	31,591	19.4%	-6,420	-3.3%
25	Hispanic CVAP	15,544	9.8%	14,574	9.4%	-970	-0.4%
25	Hispanic Registration	10,418	8.3%	9,505	7.6%	-913	-0.7%
25	2004 Prop 200 Yes	48,867	60.8%	48,667	61.4%	-200	0.6%
25	2004 President Dem	28,637	33.4%	27,828	32.9%	-809	-0.5%
25	2006 Sec of St Dem	18,128	29.4%	17,593	29.1%	-535	-0.3%
25	2008 President Dem	31,583	34.9%	30,777	34.1%	-806	-0.8%
25	2010 Mine Dem	20,012	32.1%	19,522	31.3%	-490	-0.9%

26	Deviation from Ideal Populatio	591	0.3%	-183	-0.1%	-774	-0.4%
26	NH White	96,917	45.4%	105,597	49.6%	8,680	4.2%
26	Hispanic	82,251	38.5%	79,911	37.5%	-2,340	-1.0%
26	NH Native American	10,155	4.8%	10,210	4.8%	55	0.0%
26	NH African American	11,034	5.2%	8,202	3.9%	-2,832	-1.3%
26	Total minority	116,742	54.6%	107,287	50.4%	-9,455	-4.2%
26	18+ NH White	85,964	52.3%	89,378	56.7%	3,414	4.4%
26	18+ Hispanic	52,537	32.0%	49,167	31.2%	-3,370	-0.8%
26	18+ NH Native American	6,994	4.3%	6,781	4.3%	-213	0.0%
26	18+ African-American	8,347	5.1%	6,069	3.8%	-2,278	-1.2%
26	18+ total minority	78,459	47.7%	68,262	43.3%	-10,197	-4.4%
26	Hispanic CVAP	24,140	18.7%	20,845	16.0%	-3,295	-2.8%
26	Hispanic Registration	14,998	17.2%	14,406	14.6%	-592	-2.6%
26	2004 Prop 200 Yes	25,937	50.3%	34,554	56.2%	8,617	5.8%
26	2004 President Dem	29,553	53.2%	29,862	45.4%	309	-7.8%
26	2006 Sec of St Dem	16,225	47.7%	16,305	39.7%	80	-8.0%
26	2008 President Dem	31,363	58.2%	32,121	49.3%	758	-8.8%
26	2010 Mine Dem	18,403	55.9%	19,339	46.3%	936	-9.6%

27	Deviation from Ideal Populatio	8,872	4.2%	27	0.0%	8,899	4.2%
27	NH White	40,058	19.6%	38,653	18.1%	-1,405	-1.5%
27	Hispanic	116,568	57.1%	127,010	59.6%	10,442	2.5%
27	NH Native American	7,628	3.7%	7,548	3.5%	-80	-0.2%
27	NH African American	29,982	14.7%	30,236	14.2%	254	-0.5%
27	Total minority	164,137	80.4%	174,442	81.9%	10,305	1.5%
27	18+ NH White	34,090	24.3%	32,733	22.6%	-1,357	-1.7%
27	18+ Hispanic	73,051	52.1%	79,041	54.6%	5,990	2.5%
27	18+ NH Native American	5,177	3.7%	5,116	3.5%	-61	-0.2%
27	18+ African-American	21,210	15.1%	21,353	14.8%	143	-0.4%
27	18+ total minority	106,239	75.7%	112,023	77.4%	5,784	1.7%
27	Hispanic CVAP	42,910	43.3%	46,905	44.6%	3,995	1.3%
27	Hispanic Registration	28,591	37.7%	30,364	39.0%	1,773	1.3%
27	2004 Prop 200 Yes	13,873	47.9%	13,733	47.8%	-140	-0.1%
27	2004 President Dem	20,967	67.8%	20,936	68.4%	-31	0.6%

27	2006 Sec of St Dem	14,205	66.6%	14,269	67.0%	64	0.4%
27	2008 President Dem	30,380	71.1%	30,877	71.4%	497	0.2%
27	2010 Mine Dem	20,201	72.7%	20,681	73.4%	480	0.7%

28	Deviation from Ideal Populatio	5,645	2.6%	147	0.1%	-5,498	-2.6%
28	NH White	152,121	69.6%	142,502	66.8%	-9,619	-2.7%
28	Hispanic	48,111	22.0%	49,976	23.4%	1,865	1.4%
28	NH Native-American	2,958	1.4%	3,529	1.7%	571	0.3%
28	NH African-American	5,919	2.7%	7,179	3.4%	1,260	0.7%
28	Total minority	66,592	30.4%	70,713	33.2%	4,121	2.7%
28	18+ NH White	126,340	74.5%	118,857	72.2%	-7,483	-2.3%
28	18+ Hispanic	30,085	17.7%	31,120	18.9%	1,035	1.2%
28	18+ NH Native American	2,136	1.3%	2,483	1.5%	347	0.2%
28	18+ African-American	4,391	2.6%	5,276	3.2%	885	0.6%
28	18+ total minority	43,268	25.5%	45,863	27.8%	2,595	2.3%
28	Hispanic CVAP	14,373	8.9%	14,120	9.4%	-253	0.5%
28	Hispanic Registration	8,663	6.8%	8,683	7.3%	20	0.5%
28	2004 Prop 200 Yes	49,838	53.7%	48,962	55.1%	-876	1.4%
28	2004 President Dem	43,544	44.2%	40,937	43.4%	-2,607	-0.8%
28	2006 Sec of St Dem	25,948	37.1%	24,194	36.3%	-1,754	-0.9%
28	2008 President Dem	44,399	46.0%	40,302	45.4%	-4,097	-0.6%
28	2010 Mine Dem	28,730	42.0%	25,970	41.6%	-2,760	-0.4%

29	Deviation from Ideal Populatio	-2,000	-0.9%	128	0.1%	2,128	1.0%
29	NH White	45,815	21.7%	44,688	21.0%	-1,127	-0.7%
29	Hispanic	142,923	67.7%	145,527	68.3%	2,604	0.5%
29	NH Native-American	2,119	1.0%	2,415	1.1%	296	0.1%
29	NH African-American	12,402	5.9%	13,055	6.1%	653	0.2%
29	Total minority	165,252	78.3%	168,508	79.0%	3,256	0.7%
29	18+ NH White	36,737	27.1%	36,589	26.6%	-148	-0.6%
29	18+ Hispanic	83,827	61.9%	85,823	62.3%	1,996	0.4%
29	18+ NH Native American	1,459	1.1%	1,664	1.2%	205	0.1%
29	18+ African-American	8,345	6.2%	8,736	6.3%	391	0.2%
29	18+ total minority	98,689	72.9%	101,121	73.4%	2,432	0.6%
29	Hispanic CVAP	42,432	45.8%	44,892	45.8%	2,460	-0.1%
29	Hispanic Registration	25,590	39.3%	25,937	40.3%	347	1.0%
29	2004 Prop 200 Yes	17,311	55.8%	17,055	55.4%	-256	-0.4%
29	2004 President Dem	16,917	51.9%	17,014	52.6%	97	0.7%
29	2006 Sec of St Dem	10,116	49.4%	9,971	49.5%	-145	0.1%
29	2008 President Dem	20,828	57.4%	20,741	58.4%	-87	1.0%
29	2010 Mine Dem	14,820	60.9%	14,950	62.4%	130	1.5%

30	Deviation from Ideal Populatio	-5,304	-2.5%	71	0.0%	5,375	2.5%
30	NH White	59,550	28.7%	57,617	27.0%	-1,933	-1.6%
30	Hispanic	119,436	57.5%	129,134	60.6%	9,698	3.1%
30	NH Native-American	4,666	2.2%	4,622	2.2%	-44	-0.1%
30	NH African-American	12,944	6.2%	11,651	5.5%	-1,293	-0.8%

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30	Total minority	148,213	71.3%	155,522	73.0%	7,309	1.6%
30	18+ NH White	50,160	35.5%	49,373	34.0%	-787	-1.5%
30	18+ Hispanic	71,675	50.7%	77,797	53.5%	6,122	2.8%
30	18+ NH Native American	3,210	2.3%	3,266	2.2%	56	0.0%
30	18+ African-American	8,834	6.3%	8,160	5.6%	-674	-0.6%
30	18+ total minority	91,111	64.5%	95,975	66.0%	4,864	1.5%
30	Hispanic CVAP	35,571	32.9%	37,027	35.1%	1,456	2.2%
30	Hispanic Registration	20,331	30.0%	20,862	30.4%	531	0.4%
30	2004 Prop 200 Yes	20,080	54.8%	20,208	51.6%	128	-3.1%
30	2004 President Dem	20,223	52.1%	23,483	57.0%	3,260	4.9%
30	2006 Sec of St Dem	11,154	46.8%	14,218	53.1%	3,064	6.3%
30	2008 President Dem	21,713	54.8%	24,236	60.2%	2,523	5.4%
30	2010 Mine Dem	15,050	56.3%	17,615	62.3%	2,565	6.0%

SPLITS - Final_Leg_Districts compared to Plaintiffs_Plan_X

County	5	5	5	5	5	5	0	0	0
Census Place	439	24	15	453	13	12	14	-11	-3
Census Tract	1,281	230	15	1,219	284	23	-62	54	8
Census Blk Grp	3,899	269	10	3,795	366	17	-104	97	7
Reservation	15	3	4	15	3	4	0	0	0
Tribal Subdiv	138	4	4	138	4	4	0	0	0

COMPETITIVENESS - Final_Leg_Districts compared to Plaintiffs_Plan_X

1	Index2	66.4%	33.6%	32.8%	66.4%	33.6%	32.8%	0.0%	0.0%	0.0%
1	Index3	67.6%	32.4%	35.2%	67.5%	32.5%	35.0%	-0.1%	0.1%	-0.2%
1	Index4	67.2%	32.8%	34.4%	67.2%	32.8%	34.4%	0.0%	0.0%	0.0%
1	Index5	67.8%	32.2%	35.6%	67.7%	32.3%	35.4%	-0.1%	0.1%	-0.2%
1	Index6	65.9%	34.1%	31.8%	65.8%	34.2%	31.6%	-0.1%	0.1%	-0.2%
1	Index7	66.7%	33.3%	33.4%	66.6%	33.4%	33.2%	-0.1%	0.1%	-0.2%
1	Index8	65.8%	34.2%	31.6%	65.8%	34.2%	31.6%	0.0%	0.0%	0.0%
1	Index9	66.9%	33.1%	33.8%	66.8%	33.2%	33.6%	-0.1%	0.1%	-0.2%
								-0.1%	0.1%	0.1%
2	Index2	42.8%	57.2%	14.4%	41.4%	58.6%	17.2%	-1.4%	1.4%	2.8%
2	Index3	40.8%	59.2%	18.4%	39.4%	60.6%	21.2%	-1.4%	1.4%	2.8%
2	Index4	45.9%	54.1%	8.2%	44.8%	55.2%	10.4%	-1.1%	1.1%	2.2%
2	Index5	44.1%	55.9%	11.8%	43.0%	57.0%	14.0%	-1.1%	1.1%	2.2%
2	Index6	43.6%	56.4%	12.8%	42.3%	57.7%	15.4%	-1.3%	1.3%	2.6%
2	Index7	42.2%	57.8%	15.6%	41.0%	59.0%	18.0%	-1.2%	1.2%	2.4%
2	Index8	43.2%	56.8%	13.6%	41.8%	58.2%	16.4%	-1.4%	1.4%	2.8%
2	Index9	41.6%	58.4%	16.8%	40.3%	59.7%	19.4%	-1.3%	1.3%	2.6%
								-0.7%	0.8%	-0.1%

3	Index2	31.0%	69.0%	38.0%	31.3%	68.7%	37.4%	0.3%	-0.3%	-0.6%
3	Index3	29.4%	70.6%	41.2%	29.6%	70.4%	40.8%	0.2%	-0.2%	-0.4%
3	Index4	35.0%	65.0%	30.0%	35.2%	64.8%	29.6%	0.2%	-0.2%	-0.4%
3	Index5	33.2%	66.8%	33.6%	33.4%	66.6%	33.2%	0.2%	-0.2%	-0.4%
3	Index6	31.8%	68.2%	36.4%	32.0%	68.0%	36.0%	0.2%	-0.2%	-0.4%
3	Index7	30.6%	69.4%	38.8%	30.8%	69.2%	38.4%	0.2%	-0.2%	-0.4%
3	Index8	31.3%	68.7%	37.4%	31.6%	68.4%	36.8%	0.3%	-0.3%	-0.6%
3	Index9	30.0%	70.0%	40.0%	30.2%	69.8%	39.6%	0.2%	-0.2%	-0.4%
								0.0%	0.0%	-0.1%
4	Index2	45.5%	54.5%	9.0%	47.3%	52.7%	5.4%	1.8%	-1.8%	-3.6%
4	Index3	42.9%	57.1%	14.2%	44.6%	55.4%	10.8%	1.7%	-1.7%	-3.4%
4	Index4	48.6%	51.4%	2.8%	50.3%	49.7%	0.6%	1.7%	-1.7%	-2.2%
4	Index5	46.4%	53.6%	7.2%	48.1%	51.9%	3.8%	1.7%	-1.7%	-3.4%
4	Index6	46.3%	53.7%	7.4%	48.1%	51.9%	3.8%	1.8%	-1.8%	-3.6%
4	Index7	44.6%	55.4%	10.8%	46.3%	53.7%	7.4%	1.7%	-1.7%	-3.4%
4	Index8	45.8%	54.2%	8.4%	47.6%	52.4%	4.8%	1.8%	-1.8%	-3.6%
4	Index9	43.8%	56.2%	12.4%	45.5%	54.5%	9.0%	1.7%	-1.7%	-3.4%
								1.0%	-0.8%	-0.2%
5	Index2	65.6%	34.4%	31.2%	65.4%	34.6%	30.8%	-0.2%	0.2%	-0.4%
5	Index3	64.6%	35.4%	29.2%	64.2%	35.8%	28.4%	-0.4%	0.4%	-0.8%
5	Index4	65.4%	34.6%	30.8%	65.2%	34.8%	30.4%	-0.2%	0.2%	-0.4%
5	Index5	64.9%	35.1%	29.8%	64.6%	35.4%	29.2%	-0.3%	0.3%	-0.6%
5	Index6	64.2%	35.8%	28.4%	64.0%	36.0%	28.0%	-0.2%	0.2%	-0.4%
5	Index7	63.9%	36.1%	27.8%	63.6%	36.4%	27.2%	-0.3%	0.3%	-0.6%
5	Index8	64.5%	35.5%	29.0%	64.3%	35.7%	28.6%	-0.2%	0.2%	-0.4%
5	Index9	64.1%	35.9%	28.2%	63.7%	36.3%	27.4%	-0.4%	0.4%	-0.8%
								-0.2%	0.5%	-0.3%
6	Index2	54.7%	45.3%	9.4%	54.7%	45.3%	9.4%	0.0%	0.0%	0.0%
6	Index3	55.3%	44.7%	10.6%	55.3%	44.7%	10.6%	0.0%	0.0%	0.0%
6	Index4	55.9%	44.1%	11.8%	55.9%	44.1%	11.8%	0.0%	0.0%	0.0%
6	Index5	56.0%	44.0%	12.0%	56.0%	44.0%	12.0%	0.0%	0.0%	0.0%
6	Index6	53.7%	46.3%	7.4%	53.7%	46.3%	7.4%	0.0%	0.0%	0.0%
6	Index7	54.3%	45.7%	8.6%	54.3%	45.7%	8.6%	0.0%	0.0%	0.0%
6	Index8	53.8%	46.2%	7.6%	53.8%	46.2%	7.6%	0.0%	0.0%	0.0%
6	Index9	54.5%	45.5%	9.0%	54.5%	45.5%	9.0%	0.0%	0.0%	0.0%
								0.0%	0.0%	0.0%
7	Index2	36.3%	63.7%	27.4%	37.4%	62.6%	25.2%	1.1%	-1.1%	-2.2%
7	Index3	32.9%	67.1%	34.2%	34.2%	65.8%	31.6%	1.3%	-1.3%	-2.6%
7	Index4	39.6%	60.4%	20.8%	40.5%	59.5%	19.0%	0.9%	-0.9%	-1.8%
7	Index5	37.0%	63.0%	26.0%	38.0%	62.0%	24.0%	1.0%	-1.0%	-2.0%
7	Index6	37.1%	62.9%	25.8%	37.9%	62.1%	24.2%	0.8%	-0.8%	-1.6%
7	Index7	34.9%	65.1%	30.2%	35.9%	64.1%	28.2%	1.0%	-1.0%	-2.0%

7	Index8	36.5%	63.5%	27.0%	37.5%	62.5%	25.0%	1.0%	-1.0%	-2.0%
7	Index9	34.0%	66.0%	32.0%	35.1%	64.9%	29.8%	1.1%	-1.1%	-2.2%
								0.9%	-1.4%	0.5%
8	Index2	51.3%	48.7%	2.6%	54.1%	45.9%	8.2%	2.8%	-2.8%	5.6%
8	Index3	48.5%	51.5%	3.0%	52.1%	47.9%	4.2%	3.6%	-3.6%	1.2%
8	Index4	53.1%	46.9%	6.2%	55.2%	44.8%	10.4%	2.1%	-2.1%	4.2%
8	Index5	51.1%	48.9%	2.2%	53.8%	46.2%	7.6%	2.7%	-2.7%	5.4%
8	Index6	51.4%	48.6%	2.8%	53.4%	46.6%	6.8%	2.0%	-2.0%	4.0%
8	Index7	49.7%	50.3%	0.6%	52.3%	47.7%	4.6%	2.6%	-2.6%	4.0%
8	Index8	51.1%	48.9%	2.2%	53.4%	46.6%	6.8%	2.3%	-2.3%	4.6%
8	Index9	49.0%	51.0%	2.0%	52.0%	48.0%	4.0%	3.0%	-3.0%	2.0%
								2.3%	-4.8%	2.5%
9	Index2	46.7%	53.3%	6.6%	47.5%	52.5%	5.0%	0.8%	-0.8%	-1.6%
9	Index3	46.9%	53.1%	6.2%	47.7%	52.3%	4.6%	0.8%	-0.8%	-1.6%
9	Index4	49.5%	50.5%	1.0%	50.3%	49.7%	0.6%	0.8%	-0.8%	-0.4%
9	Index5	49.1%	50.9%	1.8%	49.9%	50.1%	0.2%	0.8%	-0.8%	-1.6%
9	Index6	46.7%	53.3%	6.6%	47.5%	52.5%	5.0%	0.8%	-0.8%	-1.6%
9	Index7	46.8%	53.2%	6.4%	47.6%	52.4%	4.8%	0.8%	-0.8%	-1.6%
9	Index8	46.4%	53.6%	7.2%	47.2%	52.8%	5.6%	0.8%	-0.8%	-1.6%
9	Index9	46.6%	53.4%	6.8%	47.5%	52.5%	5.0%	0.9%	-0.9%	-1.8%
								0.7%	-0.6%	-0.1%
10	Index2	48.0%	52.0%	4.0%	49.0%	51.0%	2.0%	1.0%	-1.0%	-2.0%
10	Index3	47.8%	52.2%	4.4%	48.9%	51.1%	2.2%	1.1%	-1.1%	-2.2%
10	Index4	50.7%	49.3%	1.4%	51.7%	48.3%	3.4%	1.0%	-1.0%	2.0%
10	Index5	50.1%	49.9%	0.2%	51.1%	48.9%	2.2%	1.0%	-1.0%	2.0%
10	Index6	48.0%	52.0%	4.0%	49.1%	50.9%	1.8%	1.1%	-1.1%	-2.2%
10	Index7	47.9%	52.1%	4.2%	49.0%	51.0%	2.0%	1.1%	-1.1%	-2.2%
10	Index8	47.8%	52.2%	4.4%	48.8%	51.2%	2.4%	1.0%	-1.0%	-2.0%
10	Index9	47.7%	52.3%	4.6%	48.8%	51.2%	2.4%	1.1%	-1.1%	-2.2%
								0.9%	-1.0%	0.1%
11	Index2	58.7%	41.3%	17.4%	57.5%	42.5%	15.0%	-1.2%	1.2%	-2.4%
11	Index3	58.5%	41.5%	17.0%	56.6%	43.4%	13.2%	-1.9%	1.9%	-3.8%
11	Index4	60.3%	39.7%	20.6%	59.1%	40.9%	18.2%	-1.2%	1.2%	-2.4%
11	Index5	59.9%	40.1%	19.8%	58.2%	41.8%	16.4%	-1.7%	1.7%	-3.4%
11	Index6	58.4%	41.6%	16.8%	57.1%	42.9%	14.2%	-1.3%	1.3%	-2.6%
11	Index7	58.3%	41.7%	16.6%	56.7%	43.3%	13.4%	-1.6%	1.6%	-3.2%
11	Index8	58.3%	41.7%	16.6%	57.0%	43.0%	14.0%	-1.3%	1.3%	-2.6%
11	Index9	58.2%	41.8%	16.4%	56.5%	43.5%	13.0%	-1.7%	1.7%	-3.4%
								-1.4%	2.9%	-1.5%
12	Index2	66.1%	33.9%	32.2%	64.8%	35.2%	29.6%	-1.3%	1.3%	-2.6%
12	Index3	67.2%	32.8%	34.4%	66.0%	34.0%	32.0%	-1.2%	1.2%	-2.4%
12	Index4	68.3%	31.7%	36.6%	67.4%	32.6%	34.8%	-0.9%	0.9%	-1.8%

12	Index5	68.6%	31.4%	37.2%	67.6%	32.4%	35.2%	-1.0%	1.0%	-2.0%
12	Index6	66.6%	33.4%	33.2%	65.7%	34.3%	31.4%	-0.9%	0.9%	-1.8%
12	Index7	67.2%	32.8%	34.4%	66.2%	33.8%	32.4%	-1.0%	1.0%	-2.0%
12	Index8	66.2%	33.8%	32.4%	65.1%	34.9%	30.2%	-1.1%	1.1%	-2.2%
12	Index9	67.0%	33.0%	34.0%	65.9%	34.1%	31.8%	-1.1%	1.1%	-2.2%
								-1.1%	0.7%	0.4%
13	Index2	64.7%	35.3%	29.4%	64.1%	35.9%	28.2%	-0.6%	0.6%	-1.2%
13	Index3	63.8%	36.2%	27.6%	63.4%	36.6%	26.8%	-0.4%	0.4%	-0.8%
13	Index4	65.9%	34.1%	31.8%	65.5%	34.5%	31.0%	-0.4%	0.4%	-0.8%
13	Index5	65.1%	34.9%	30.2%	64.8%	35.2%	29.6%	-0.3%	0.3%	-0.6%
13	Index6	64.7%	35.3%	29.4%	64.3%	35.7%	28.6%	-0.4%	0.4%	-0.8%
13	Index7	64.1%	35.9%	28.2%	63.9%	36.1%	27.8%	-0.2%	0.2%	-0.4%
13	Index8	64.5%	35.5%	29.0%	64.0%	36.0%	28.0%	-0.5%	0.5%	-1.0%
13	Index9	63.8%	36.2%	27.6%	63.5%	36.5%	27.0%	-0.3%	0.3%	-0.6%
								-0.1%	-0.3%	0.3%
14	Index2	60.6%	39.4%	21.2%	60.5%	39.5%	21.0%	-0.1%	0.1%	-0.2%
14	Index3	59.3%	40.7%	18.6%	59.2%	40.8%	18.4%	-0.1%	0.1%	-0.2%
14	Index4	61.7%	38.3%	23.4%	61.5%	38.5%	23.0%	-0.2%	0.2%	-0.4%
14	Index5	60.7%	39.3%	21.4%	60.5%	39.5%	21.0%	-0.2%	0.2%	-0.4%
14	Index6	60.5%	39.5%	21.0%	60.3%	39.7%	20.6%	-0.2%	0.2%	-0.4%
14	Index7	59.8%	40.2%	19.6%	59.6%	40.4%	19.2%	-0.2%	0.2%	-0.4%
14	Index8	60.3%	39.7%	20.6%	60.2%	39.8%	20.4%	-0.1%	0.1%	-0.2%
14	Index9	59.5%	40.5%	19.0%	59.3%	40.7%	18.6%	-0.2%	0.2%	-0.4%
								-0.1%	0.2%	0.0%
15	Index2	61.5%	38.5%	23.0%	59.3%	40.7%	18.6%	-2.2%	2.2%	-4.4%
15	Index3	62.5%	37.5%	25.0%	60.1%	39.9%	20.2%	-2.4%	2.4%	-4.8%
15	Index4	63.8%	36.2%	27.6%	62.1%	37.9%	24.2%	-1.7%	1.7%	-3.4%
15	Index5	64.0%	36.0%	28.0%	62.0%	38.0%	24.0%	-2.0%	2.0%	-4.0%
15	Index6	62.0%	38.0%	24.0%	60.2%	39.8%	20.4%	-1.8%	1.8%	-3.6%
15	Index7	62.5%	37.5%	25.0%	60.5%	39.5%	21.0%	-2.0%	2.0%	-4.0%
15	Index8	61.5%	38.5%	23.0%	59.6%	40.4%	19.2%	-1.9%	1.9%	-3.8%
15	Index9	62.3%	37.7%	24.6%	60.1%	39.9%	20.2%	-2.2%	2.2%	-4.4%
								-2.7%	1.3%	1.3%
16	Index2	61.2%	38.8%	22.4%	61.6%	38.4%	23.2%	0.4%	-0.4%	0.8%
16	Index3	61.5%	38.5%	23.0%	62.1%	37.9%	24.2%	0.6%	-0.6%	1.2%
16	Index4	63.2%	36.8%	26.4%	63.5%	36.5%	27.0%	0.3%	-0.3%	0.6%
16	Index5	63.0%	37.0%	26.0%	63.4%	36.6%	26.8%	0.4%	-0.4%	0.8%
16	Index6	61.5%	38.5%	23.0%	61.8%	38.2%	23.6%	0.3%	-0.3%	0.6%
16	Index7	61.6%	38.4%	23.2%	62.0%	38.0%	24.0%	0.4%	-0.4%	0.8%
16	Index8	61.1%	38.9%	22.2%	61.5%	38.5%	23.0%	0.4%	-0.4%	0.8%
16	Index9	61.4%	38.6%	22.8%	61.9%	38.1%	23.8%	0.5%	-0.5%	1.0%
								0.9%	-0.3%	-0.7%

17	Index2	57.9%	42.1%	15.8%	57.2%	42.8%	14.4%	-0.7%	0.7%	-1.4%
17	Index3	58.8%	41.2%	17.6%	58.1%	41.9%	16.2%	-0.7%	0.7%	-1.4%
17	Index4	60.8%	39.2%	21.6%	60.2%	39.8%	20.4%	-0.6%	0.6%	-1.2%
17	Index5	60.8%	39.2%	21.6%	60.2%	39.8%	20.4%	-0.6%	0.6%	-1.2%
17	Index6	58.8%	41.2%	17.6%	58.1%	41.9%	16.2%	-0.7%	0.7%	-1.4%
17	Index7	59.2%	40.8%	18.4%	58.5%	41.5%	17.0%	-0.7%	0.7%	-1.4%
17	Index8	58.2%	41.8%	16.4%	57.5%	42.5%	15.0%	-0.7%	0.7%	-1.4%
17	Index9	58.8%	41.2%	17.6%	58.1%	41.9%	16.2%	-0.7%	0.7%	-1.4%
								-0.6%	0.4%	0.2%
18	Index2	51.5%	48.5%	3.0%	50.1%	49.9%	0.2%	-1.4%	1.4%	-2.8%
18	Index3	52.9%	47.1%	5.8%	51.5%	48.5%	3.0%	-1.4%	1.4%	-2.8%
18	Index4	55.0%	45.0%	10.0%	53.7%	46.3%	7.4%	-1.3%	1.3%	-2.6%
18	Index5	55.1%	44.9%	10.2%	53.8%	46.2%	7.6%	-1.3%	1.3%	-2.6%
18	Index6	52.3%	47.7%	4.6%	51.0%	49.0%	2.0%	-1.3%	1.3%	-2.6%
18	Index7	53.0%	47.0%	6.0%	51.6%	48.4%	3.2%	-1.4%	1.4%	-2.8%
18	Index8	51.7%	48.3%	3.4%	50.3%	49.7%	0.6%	-1.4%	1.4%	-2.8%
18	Index9	52.7%	47.3%	5.4%	51.3%	48.7%	2.6%	-1.4%	1.4%	-2.8%
								-1.2%	0.8%	0.5%
19	Index2	37.1%	62.9%	25.8%	37.1%	62.9%	25.8%	0.0%	0.0%	0.0%
19	Index3	35.8%	64.2%	28.4%	35.8%	64.2%	28.4%	0.0%	0.0%	0.0%
19	Index4	43.6%	56.4%	12.8%	43.5%	56.5%	13.0%	-0.1%	0.1%	0.2%
19	Index5	41.5%	58.5%	17.0%	41.5%	58.5%	17.0%	0.0%	0.0%	0.0%
19	Index6	41.2%	58.8%	17.6%	41.2%	58.8%	17.6%	0.0%	0.0%	0.0%
19	Index7	39.6%	60.4%	20.8%	39.6%	60.4%	20.8%	0.0%	0.0%	0.0%
19	Index8	39.6%	60.4%	20.8%	39.6%	60.4%	20.8%	0.0%	0.0%	0.0%
19	Index9	38.0%	62.0%	24.0%	38.0%	62.0%	24.0%	0.0%	0.0%	0.0%
								0.1%	-0.1%	0.0%
20	Index2	56.6%	43.4%	13.2%	57.9%	42.1%	15.8%	1.3%	-1.3%	2.6%
20	Index3	56.4%	43.6%	12.8%	57.5%	42.5%	15.0%	1.1%	-1.1%	2.2%
20	Index4	59.4%	40.6%	18.8%	60.1%	39.9%	20.2%	0.7%	-0.7%	1.4%
20	Index5	58.7%	41.3%	17.4%	59.5%	40.5%	19.0%	0.8%	-0.8%	1.6%
20	Index6	57.5%	42.5%	15.0%	58.3%	41.7%	16.6%	0.8%	-0.8%	1.6%
20	Index7	57.2%	42.8%	14.4%	58.0%	42.0%	16.0%	0.8%	-0.8%	1.6%
20	Index8	56.9%	43.1%	13.8%	57.8%	42.2%	15.6%	0.9%	-0.9%	1.8%
20	Index9	56.7%	43.3%	13.4%	57.6%	42.4%	15.2%	0.9%	-0.9%	1.8%
								0.9%	-0.3%	-0.6%
21	Index2	57.8%	42.2%	15.6%	57.8%	42.2%	15.6%	0.0%	0.0%	0.0%
21	Index3	57.4%	42.6%	14.8%	57.4%	42.6%	14.8%	0.0%	0.0%	0.0%
21	Index4	59.9%	40.1%	19.8%	59.9%	40.1%	19.8%	0.0%	0.0%	0.0%
21	Index5	59.2%	40.8%	18.4%	59.2%	40.8%	18.4%	0.0%	0.0%	0.0%
21	Index6	58.3%	41.7%	16.6%	58.3%	41.7%	16.6%	0.0%	0.0%	0.0%
21	Index7	58.0%	42.0%	16.0%	58.0%	42.0%	16.0%	0.0%	0.0%	0.0%
21	Index8	57.9%	42.1%	15.8%	57.9%	42.1%	15.8%	0.0%	0.0%	0.0%

21	Index9	57.6%	42.4%	15.2%	57.5%	42.5%	15.0%	-0.1%	0.1%	-0.2%
								0.0%	0.0%	0.1%
22	Index2	63.9%	36.1%	27.8%	64.1%	35.9%	28.2%	0.2%	-0.2%	0.4%
22	Index3	64.6%	35.4%	29.2%	64.9%	35.1%	29.8%	0.3%	-0.3%	0.6%
22	Index4	64.8%	35.2%	29.6%	65.0%	35.0%	30.0%	0.2%	-0.2%	0.4%
22	Index5	65.0%	35.0%	30.0%	65.3%	34.7%	30.6%	0.3%	-0.3%	0.6%
22	Index6	63.2%	36.8%	26.4%	63.5%	36.5%	27.0%	0.3%	-0.3%	0.6%
22	Index7	63.8%	36.2%	27.6%	64.1%	35.9%	28.2%	0.3%	-0.3%	0.6%
22	Index8	63.2%	36.8%	26.4%	63.4%	36.6%	26.8%	0.2%	-0.2%	0.4%
22	Index9	63.9%	36.1%	27.8%	64.2%	35.8%	28.4%	0.3%	-0.3%	0.6%
								0.4%	-0.3%	-0.1%
23	Index2	62.0%	38.0%	24.0%	62.9%	37.1%	25.8%	0.9%	-0.9%	1.8%
23	Index3	63.9%	36.1%	27.8%	64.8%	35.2%	29.6%	0.9%	-0.9%	1.8%
23	Index4	63.6%	36.4%	27.2%	64.3%	35.7%	28.6%	0.7%	-0.7%	1.4%
23	Index5	64.4%	35.6%	28.8%	65.1%	34.9%	30.2%	0.7%	-0.7%	1.4%
23	Index6	61.8%	38.2%	23.6%	62.5%	37.5%	25.0%	0.7%	-0.7%	1.4%
23	Index7	62.9%	37.1%	25.8%	63.7%	36.3%	27.4%	0.8%	-0.8%	1.6%
23	Index8	61.6%	38.4%	23.2%	62.3%	37.7%	24.6%	0.7%	-0.7%	1.4%
23	Index9	63.1%	36.9%	26.2%	63.9%	36.1%	27.8%	0.8%	-0.9%	1.6%
								0.8%	-0.6%	-0.2%
24	Index2	38.4%	61.6%	23.2%	42.2%	57.8%	15.6%	3.8%	-3.8%	-7.6%
24	Index3	38.5%	61.5%	23.0%	42.9%	57.1%	14.2%	4.4%	-4.4%	-8.8%
24	Index4	43.0%	57.0%	14.0%	46.3%	53.7%	7.4%	3.3%	-3.3%	-6.6%
24	Index5	42.2%	57.8%	15.6%	45.9%	54.1%	8.2%	3.7%	-3.7%	-7.4%
24	Index6	40.1%	59.9%	19.8%	43.4%	56.6%	13.2%	3.3%	-3.3%	-6.6%
24	Index7	39.8%	60.2%	20.4%	43.6%	56.4%	12.8%	3.8%	-3.8%	-7.6%
24	Index8	39.2%	60.8%	21.6%	42.7%	57.3%	14.6%	3.5%	-3.5%	-7.0%
24	Index9	39.1%	60.9%	21.8%	43.1%	56.9%	13.8%	4.0%	-4.0%	-8.0%
								4.0%	-3.2%	-0.8%
25	Index2	64.6%	35.4%	29.2%	65.3%	34.7%	30.6%	0.7%	-0.7%	1.4%
25	Index3	65.3%	34.7%	30.6%	66.1%	33.9%	32.2%	0.8%	-0.8%	1.6%
25	Index4	66.6%	33.4%	33.2%	67.1%	32.9%	34.2%	0.5%	-0.5%	1.0%
25	Index5	66.7%	33.3%	33.4%	67.2%	32.8%	34.4%	0.5%	-0.5%	1.0%
25	Index6	65.1%	34.9%	30.2%	65.7%	34.3%	31.4%	0.6%	-0.6%	1.2%
25	Index7	65.5%	34.5%	31.0%	66.1%	33.9%	32.2%	0.6%	-0.6%	1.2%
25	Index8	64.6%	35.4%	29.2%	65.2%	34.8%	30.4%	0.6%	-0.6%	1.2%
25	Index9	65.2%	34.8%	30.4%	65.9%	34.1%	31.8%	0.7%	-0.7%	1.4%
								0.5%	-0.6%	0.1%
26	Index2	41.9%	58.1%	16.2%	50.9%	49.1%	1.8%	9.0%	-9.0%	-14.4%
26	Index3	42.6%	57.4%	14.8%	51.2%	48.8%	2.4%	8.6%	-8.6%	-12.4%
26	Index4	47.1%	52.9%	5.8%	54.9%	45.1%	9.8%	7.8%	-7.8%	4.0%
26	Index5	46.5%	53.5%	7.0%	54.3%	45.7%	8.6%	7.8%	-7.8%	1.6%

26	Index6	44.3%	55.7%	11.4%	52.5%	47.5%	5.0%	8.2%	-8.2%	-6.4%
26	Index7	44.2%	55.8%	11.6%	52.4%	47.6%	4.8%	8.2%	-8.2%	-6.8%
26	Index8	43.2%	56.8%	13.6%	51.7%	48.3%	3.4%	8.5%	-8.5%	-10.2%
26	Index9	43.4%	56.6%	13.2%	51.7%	48.3%	3.4%	8.3%	-8.3%	-9.8%
								6.5%	-3.2%	-3.3%
27	Index2	27.4%	72.6%	45.2%	26.9%	73.1%	46.2%	-0.5%	0.5%	1.0%
27	Index3	26.1%	73.9%	47.8%	25.5%	74.5%	49.0%	-0.6%	0.6%	1.2%
27	Index4	32.1%	67.9%	35.8%	31.6%	68.4%	36.8%	-0.5%	0.5%	1.0%
27	Index5	30.4%	69.6%	39.2%	29.8%	70.2%	40.4%	-0.6%	0.6%	1.2%
27	Index6	29.3%	70.7%	41.4%	28.8%	71.2%	42.4%	-0.5%	0.5%	1.0%
27	Index7	28.1%	71.9%	43.8%	27.6%	72.4%	44.8%	-0.5%	0.5%	1.0%
27	Index8	28.5%	71.5%	43.0%	27.9%	72.1%	44.2%	-0.6%	0.6%	1.2%
27	Index9	27.2%	72.8%	45.6%	26.7%	73.3%	46.6%	-0.5%	0.5%	1.0%
								-0.2%	0.4%	-0.1%
28	Index2	54.8%	45.2%	9.6%	55.2%	44.8%	10.4%	0.4%	-0.4%	0.8%
28	Index3	55.8%	44.2%	11.6%	56.1%	43.9%	12.2%	0.3%	-0.3%	0.6%
28	Index4	57.6%	42.4%	15.2%	58.1%	41.9%	16.2%	0.5%	-0.5%	1.0%
28	Index5	57.6%	42.4%	15.2%	58.0%	42.0%	16.0%	0.4%	-0.4%	0.8%
28	Index6	55.4%	44.6%	10.8%	56.0%	44.0%	12.0%	0.6%	-0.6%	1.2%
28	Index7	55.9%	44.1%	11.8%	56.4%	43.6%	12.8%	0.5%	-0.5%	1.0%
28	Index8	54.8%	45.2%	9.6%	55.4%	44.6%	10.8%	0.6%	-0.6%	1.2%
28	Index9	55.6%	44.4%	11.2%	56.0%	44.0%	12.0%	0.4%	-0.4%	0.8%
								-0.4%	-0.3%	0.7%
29	Index2	39.4%	60.6%	21.2%	38.1%	61.9%	23.8%	-1.3%	1.3%	2.6%
29	Index3	38.0%	62.0%	24.0%	36.5%	63.5%	27.0%	-1.5%	1.5%	3.0%
29	Index4	45.0%	55.0%	10.0%	44.2%	55.8%	11.6%	-0.8%	0.8%	1.6%
29	Index5	43.1%	56.9%	13.8%	42.1%	57.9%	15.8%	-1.0%	1.0%	2.0%
29	Index6	43.0%	57.0%	14.0%	42.2%	57.8%	15.6%	-0.8%	0.8%	1.6%
29	Index7	41.4%	58.6%	17.2%	40.4%	59.6%	19.2%	-1.0%	1.0%	2.0%
29	Index8	41.5%	58.5%	17.0%	40.5%	59.5%	19.0%	-1.0%	1.0%	2.0%
29	Index9	39.9%	60.1%	20.2%	38.7%	61.3%	22.6%	-1.2%	1.2%	2.4%
								-1.2%	1.0%	0.2%
30	Index2	42.6%	57.4%	14.8%	37.3%	62.7%	25.4%	-5.3%	5.3%	10.6%
30	Index3	41.2%	58.8%	17.6%	36.2%	63.8%	27.6%	-5.0%	5.0%	10.0%
30	Index4	47.2%	52.8%	5.6%	42.2%	57.8%	15.6%	-5.0%	5.0%	10.0%
30	Index5	45.4%	54.6%	9.2%	40.6%	59.4%	18.8%	-4.8%	4.8%	9.6%
30	Index6	45.0%	55.0%	10.0%	39.7%	60.3%	20.6%	-5.3%	5.3%	10.6%
30	Index7	43.7%	56.3%	12.6%	38.6%	61.4%	22.8%	-5.1%	5.1%	10.2%
30	Index8	43.9%	56.1%	12.2%	38.6%	61.4%	22.8%	-5.3%	5.3%	10.6%
30	Index9	42.5%	57.5%	15.0%	37.5%	62.5%	25.0%	-5.0%	5.0%	10.0%
								-2.6%	2.5%	0.1%

Index 2: Average of 2008 and 2010, each year weighted equally

Index 3: Average of 2008, 2010 and % of major party Registration, each of the three components weighted equally
Index 4: Average of 2004, 2006, 2008 and 2010, each year weighted equally
Index 5: Average of 2004, 2006, 2008, 2010 and % of major party registration, each component weighted equally
Index 6: Average of 2004, 2006, 2008, 2010 each year weighted equally, races where one candidate received more than 60% of the 2-way vote removed
Index 7: Average of 2004, 2006, 2008, 2010 and % of major party registration, each weighted equally, races where one candidate received more than 60% of the 2-way vote removed
Index 8: Weighted average of 2004 (1/6th), 2006 (1/6th), and 2008 (1/3rd), 2010 (1/3rd), races where one candidate received more than 60% of the 2-way vote removed
Index 9: Weighted average of 2004 (1/8th), 2006 (1/8th), 2008 (1/4th), 2010 (1/4th) and % of major party registration (1/4th), races where one candidate received more than 60% of the 2-way vote removed

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For two major reasons, there is limited geographic correlation between the Benchmark Districts and Proposed Districts. First, under Arizona's Constitution, the Commission must begin the redistricting process by creating a grid-like pattern of districts with equal population and then adjusting those districts to comply with the Voting Rights Act and other state constitutional criteria. Ariz. Const. art. IV, pt. 2 § 1(14). Beginning from a grid results in different numbering and geography for the Proposed Districts. Second, population increases over the past decade required significant changes in the Benchmark Plan. Arizona's population grew from 5,130,632 in 2000 to 6,392,017 in 2010, an increase of 24.6%. (*Compare* **Exhibit 13** (Benchmark Plan Demographic Data Using 2000 Census Numbers), *with* **Exhibit 3-A** (Benchmark Plan Demographic Data Using 2010 Census Numbers).) Using 2010 Census data, population in the thirty Benchmark Districts ranges from 155,897 (26.8% below the ideal population of 213,067) to 378,298 (77.6% above the ideal population). As required by the federal and state constitutions, the Proposed Plan significantly reduces these disparities – another reason for the limited geographic correlation. The Proposed Districts range between 203,026 (4.7% below the ideal population) to 221,735 (4.1% above the ideal population).

1. Demographic Data for Proposed Districts and Benchmark Districts

Included below are tables showing demographic information for both the Proposed Districts and the Benchmark Districts. Separate tables are provided showing total population and voting age population. The majority-minority districts in each Plan are indicated in bold within the tables. More detailed demographic data can be found in **Exhibits 2-A** (Proposed Districts) and **3-A** (Benchmark Districts).

Table 1: Population Summary of Proposed Legislative Districts using 2010 Census Data

Proposed District	Pop. #	Deviation From Ideal Pop. # (%)	Hispanic # (%)	Non Hispanic (NH) White # (%)	NH African American # (%)	NH Native American # (%)	NH Asian # (%)	NH Hawaiian # (%)	NH Multi-Race and Other # (%)
1	216,451	3,383 (1.6%)	24,035 (11.1%)	181,967 (84.1%)	2,526 (1.2%)	3,054 (1.4%)	3,712 (1.7%)	367 (0.2%)	790 (0.4%)
2	204,615	-8452 (-4.0%)	121,900 (59.6%)	69,116 (33.8%)	6,456 (3.2%)	3,177 (1.6%)	2,872 (1.4%)	269 (0.1%)	825 (0.4%)
3	204,613	-8,454 (-4.0%)	115,569 (56.5%)	67,222 (32.9%)	6,665 (3.3%)	8,279 (4.0%)	5,588 (2.7%)	225 (0.1%)	1,065 (0.5%)

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Proposed District	Pop.	Deviation From Ideal Pop.	Hispanic	NH White	NH Black or African American	NH American Indian	NH Asian	NH Native Hawaiian	NH Multi-Race and Other
			(%)	(%)	(%)	(%)	(%)	(%)	(%)
4	**204,143**	**-8,924 (-4.2%)**	**123,594 (60.5%)**	**58,192 (28.5%)**	**6,439 (3.2%)**	**12,195 (6.0%)**	**2,597 (1.3%)**	**262 (0.1%)**	**864 (0.4%)**
5	219,040	5,972 (2.8%)	34,316 (15.7%)	172,081 (78.6%)	2,428 (1.1%)	6,187 (2.8%)	2,800 (1.3%)	453 (0.2%)	775 (0.4%)
6	214,244	1,176 (0.6%)	33,176 (15.5%)	159,161 (74.3%)	2,540 (1.2%)	14,859 (6.9%)	3,171 (1.5%)	357 (0.2%)	980 (0.5%)
7	203,026	-10,041 (-4.7%)	13,878 (6.8%)	50,373 (24.8%)	1,123 (0.6%)	135,744 (66.9%)	905 (0.4%)	126 (0.1%)	877 (0.4%)
8	**208,422**	**-4,645 (-2.2%)**	**72,456 (34.8%)**	**104,152 (50.0%)**	**10,132 (4.9%)**	**15,434 (7.4%)**	**3,613 (1.7%)**	**1,351 (0.6%)**	**1,284 (0.6%)**
9	213,224	156 (0.1%)	46,661 (21.9%)	146,025 (68.5%)	6,987 (3.3%)	2,903 (1.4%)	9,036 (4.2%)	433 (0.2%)	1,179 (0.6%)
10	211,073	-1,994 (-0.9%)	49,128 (23.3%)	138,868 (65.8%)	10,979 (5.2%)	2,685 (1.3%)	7,525 (3.6%)	531 (0.3%)	1,357 (0.6%)
11	213,377	309 (0.1%)	48,249 (22.6%)	145,091 (68.0%)	8,206 (3.8%)	4,060 (1.9%)	6,244 (2.9%)	416 (0.2%)	1,111 (0.5%)
12	221,735	8,667 (4.1%)	34,578 (15.6%)	162,476 (73.3%)	8,188 (3.7%)	2,005 (0.9%)	12,664 (5.7%)	601 (0.3%)	1,223 (0.6%)
13	211,701	-1,336 (-0.6%)	66,106 (31.2%)	126,954 (60.0%)	8,514 (4.0%)	2,586 (1.2%)	6,015 (2.8%)	423 (0.2%)	1,103 (0.5%)
14	217,693	4,625 (2.2%)	67,082 (30.8%)	132,552 (60.9%)	8,109 (3.7%)	3,000 (1.4%)	4,935 (2.3%)	666 (0.3%)	1,349 (0.6%)
15	214,941	1,873 (0.9%)	22,035 (10.3%)	172,110 (80.1%)	5,060 (2.4%)	1,964 (0.9%)	12,257 (5.7%)	418 (0.2%)	1,097 (0.5%)
16	220,157	7,089 (3.3%)	36,222 (16.5%)	169,113 (76.8%)	5,837 (2.7%)	2,694 (1.2%)	4,828 (2.2%)	553 (0.3%)	910 (0.4%)
17	221,174	8,106 (3.8%)	47,472 (21.5%)	140,660 (63.6%)	10,486 (4.7%)	2,801 (1.3%)	17,884 (8.1%)	511 (0.2%)	1,360 (0.6%)
18	218,677	5,609 (2.6%)	31,641 (14.5%)	153,658 (70.3%)	11,670 (5.3%)	3,849 (1.8%)	15,709 (7.2%)	666 (0.3%)	1,484 (0.7%)
19	**207,088**	**-5,979 (-2.8%)**	**134,862 (65.1%)**	**45,004 (21.7%)**	**17,208 (8.3%)**	**2,755 (1.3%)**	**5,509 (2.7%)**	**470 (0.2%)**	**1,280 (0.6%)**
20	218,167	5,099 (2.4%)	46,856 (21.5%)	148,114 (67.9%)	9,777 (4.5%)	3,879 (1.8%)	7,845 (3.6%)	478 (0.2%)	1,218 (0.6%)
21	216,242	3,174 (1.5%)	53,053 (24.5%)	143,644 (66.4%)	10,044 (4.6%)	2,294 (1.1%)	5,643 (2.6%)	448 (0.2%)	1,116 (0.5%)
22	215,912	2,844 (1.3%)	22,375 (10.4%)	175,513 (81.3%)	6,786 (3.1%)	1,477 (0.7%)	8,317 (3.9%)	401 (0.2%)	1,043 (0.5%)
23	213,451	383 (0.2%)	12,212 (5.7%)	186,190 (87.2%)	3,459 (1.6%)	2,094 (1.0%)	8,422 (3.9%)	258 (0.1%)	816 (0.4%)
24	**206,659**	**-6,408 (-3.0%)**	**85,381 (41.3%)**	**92,695 (44.9%)**	**14,173 (6.9%)**	**7,459 (3.6%)**	**5,114 (2.5%)**	**399 (0.2%)**	**1,438 (0.7%)**
25	220,795	7,727 (3.6%)	43,023 (19.5%)	160,255 (72.6%)	6,982 (3.2%)	4,433 (2.0%)	4,239 (1.9%)	726 (0.3%)	1,137 (0.5%)
26	213,659	591 (0.3%)	82,251 (38.5%)	96,917 (45.4%)	12,378 (5.8%)	11,018 (5.2%)	8,374 (3.9%)	1,166 (0.5%)	1,555 (0.7%)

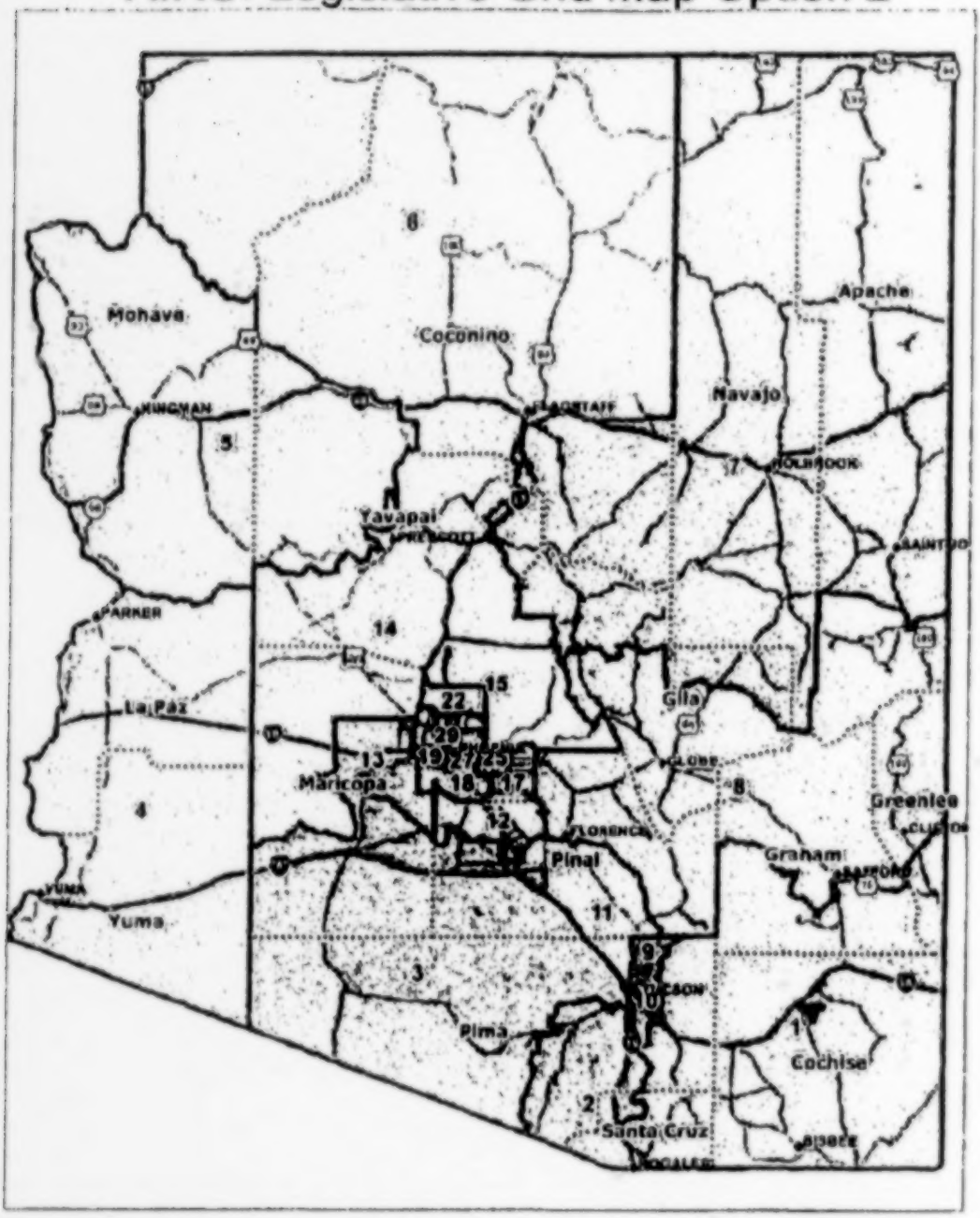
Proposed District	Pop.	Deviation from Ideal Pop.	Hispanic	Non-Hispanic (NH) White	NH African American	NH American Indian/ Native American	NH Asian	NH Native Hawaiian	NH Multi-Race and Other
27	204,195	-8,872 (-4.2%)	116,568 (57.1%)	40,058 (19.6%)	31,134 (15.2%)	8,066 (4.0%)	6,299 (3.1%)	496 (0.2%)	1,574 (0.8%)
28	218,713	5,645 (2.6%)	48,111 (22.0%)	152,121 (69.6%)	6,840 (3.1%)	3,598 (1.6%)	6,624 (3.0%)	337 (0.2%)	1,082 (0.5%)
29	211,067	-2,000 (-0.9%)	142,923 (67.7%)	45,815 (21.7%)	13,525 (6.4%)	2,600 (1.2%)	4,826 (2.3%)	264 (0.1%)	1,114 (0.5%)
30	207,763	-5,304 (-2.5%)	119,436 (57.5%)	59,550 (28.7%)	14,006 (6.7%)	5,226 (2.5%)	7,780 (3.7%)	402 (0.2%)	1,363 (0.7%)

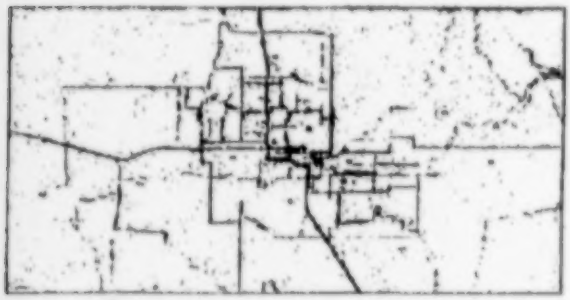
Table 2: Voting Age Population Summary of Proposed Legislative Districts using 2010 Census Data

Proposed District	Total VAP	Hispanic VAP	Non-Hispanic (NH) White VAP	NH African American VAP	NH American Indian/ Native American VAP	NH Asian VAP	NH Native Hawaiian VAP	NH Multi-Race and Other VAP
1	170,136 (78.6%)	15,190 (8.9%)	147,538 (86.7%)	1,680 (1.0%)	2,329 (1.4%)	2,611 (1.5%)	263 (0.2%)	525 (0.3%)
2	148,925 (72.8%)	78,653 (52.8%)	60,416 (40.6%)	4,718 (3.2%)	2,270 (1.5%)	2,168 (1.5%)	198 (0.1%)	502 (0.3%)
3	154,745 (75.6%)	77,451 (50.1%)	60,946 (39.4%)	4,956 (3.2%)	5,628 (3.6%)	4,876 (3.2%)	165 (0.1%)	723 (0.5%)
4	141,485 (69.3%)	78,816 (55.7%)	47,013 (33.2%)	4,719 (3.3%)	8,362 (5.9%)	1,888 (1.3%)	192 (0.1%)	495 (0.3%)
5	174,701 (79.8%)	22,009 (12.6%)	143,620 (82.2%)	1,618 (0.9%)	4,481 (2.6%)	2,151 (1.2%)	321 (0.2%)	501 (0.3%)
6	169,965 (79.3%)	21,327 (12.5%)	132,925 (78.2%)	1,865 (1.1%)	10,382 (6.1%)	2,570 (1.5%)	262 (0.2%)	634 (0.4%)
7	139,259 (68.6%)	8,545 (6.1%)	40,013 (28.7%)	840 (0.6%)	88,758 (63.7%)	662 (0.5%)	81 (0.1%)	360 (0.3%)
8	153,405 (73.6%)	48,030 (31.3%)	81,918 (53.4%)	7,269 (4.7%)	11,423 (7.4%)	2,769 (1.8%)	1,181 (0.8%)	815 (0.5%)
9	172,120 (80.7%)	31,504 (18.3%)	125,635 (73.0%)	4,794 (2.8%)	2,206 (1.3%)	6,878 (4.0%)	301 (0.2%)	802 (0.5%)
10	166,639 (78.9%)	32,487 (19.5%)	117,413 (70.5%)	7,739 (4.6%)	1,983 (1.2%)	5,789 (3.5%)	383 (0.2%)	845 (0.5%)
11	160,257 (75.1%)	29,474 (18.4%)	117,449 (73.3%)	5,258 (3.3%)	2,776 (1.7%)	4,384 (2.7%)	249 (0.2%)	667 (0.4%)
12	147,754 (66.6%)	20,504 (13.9%)	111,743 (75.6%)	4,857 (3.3%)	1,288 (0.9%)	8,376 (5.7%)	349 (0.2%)	637 (0.4%)
13	156,650 (74.0%)	40,759 (26.0%)	103,306 (65.9%)	5,616 (3.6%)	1,950 (1.2%)	4,117 (2.6%)	285 (0.2%)	617 (0.4%)

Proposed District	Total VAP	Hispanic VAP	Non-Hispanic (NH) White VAP	NH African American VAP	NH Native American VAP	NH Asian VAP	NH Hawaiian VAP	NH Multi-Race and Other VAP
	Deviation from Ideal (%)	# (%)	# (%)	# (%)	# (%)	# (%)	# (%)	# (%)
14	163,012 (74.9%)	43,999 (27.0%)	105,951 (65.0%)	5,783 (3.5%)	2,360 (1.4%)	3,672 (2.3%)	464 (0.3%)	783 (0.5%)
15	162,579 (75.6%)	13,970 (8.6%)	133,974 (82.4%)	3,369 (2.1%)	1,386 (0.9%)	8,909 (5.5%)	285 (0.2%)	686 (0.4%)
16	164,719 (74.8%)	21,337 (13.0%)	133,781 (81.2%)	3,608 (2.2%)	1,874 (1.1%)	3,299 (2.0%)	325 (0.2%)	495 (0.3%)
17	161,935 (73.2%)	29,525 (18.2%)	110,213 (68.1%)	6,913 (4.3%)	1,868 (1.2%)	12,277 (7.6%)	346 (0.2%)	793 (0.5%)
18	168,966 (77.3%)	21,459 (12.7%)	124,070 (73.4%)	7,910 (4.7%)	2,725 (1.6%)	11,451 (6.8%)	449 (0.3%)	902 (0.5%)
19	133,549 (64.5%)	80,622 (60.4%)	35,275 (26.4%)	10,697 (8.0%)	1,915 (1.4%)	4,008 (3.0%)	334 (0.3%)	698 (0.5%)
20	166,570 (76.3%)	29,476 (17.7%)	120,748 (72.5%)	6,528 (3.9%)	2,737 (1.6%)	5,958 (3.6%)	331 (0.2%)	792 (0.5%)
21	164,688 (76.2%)	32,423 (19.7%)	119,158 (72.4%)	6,510 (4.0%)	1,580 (1.0%)	4,100 (2.5%)	290 (0.2%)	627 (0.4%)
22	167,688 (77.7%)	13,708 (8.2%)	141,890 (84.6%)	4,401 (2.6%)	1,013 (0.6%)	5,804 (3.5%)	271 (0.2%)	601 (0.4%)
23	176,271 (82.6%)	8,631 (4.9%)	156,821 (89.0%)	2,546 (1.4%)	1,549 (0.9%)	5,981 (3.4%)	184 (0.1%)	559 (0.3%)
24	157,984 (76.4%)	53,875 (34.1%)	82,855 (52.4%)	10,391 (6.6%)	5,426 (3.4%)	4,185 (2.6%)	291 (0.2%)	961 (0.6%)
25	167,944 (76.1%)	26,254 (15.6%)	129,933 (77.4%)	4,610 (2.7%)	2,917 (1.7%)	3,117 (1.9%)	465 (0.3%)	648 (0.4%)
26	164,423 (77.0%)	52,537 (32.0%)	85,964 (52.3%)	9,002 (5.5%)	7,602 (4.6%)	7,468 (4.5%)	785 (0.5%)	1,065 (0.6%)
27	140,329 (68.7%)	73,051 (52.1%)	34,090 (24.3%)	21,620 (15.4%)	5,467 (3.9%)	4,819 (3.4%)	354 (0.3%)	928 (0.7%)
28	169,608 (77.5%)	30,085 (17.7%)	126,340 (74.5%)	4,722 (2.8%)	2,604 (1.5%)	4,979 (2.9%)	232 (0.1%)	646 (0.4%)
29	135,426 (64.2%)	83,827 (61.9%)	36,737 (27.1%)	8,728 (6.4%)	1,773 (1.3%)	3,540 (2.6%)	182 (0.1%)	639 (0.5%)
30	141,271 (68.8%)	71,675 (50.7%)	50,160 (35.5%)	9,207 (6.5%)	3,601 (2.5%)	5,508 (3.9%)	291 (0.2%)	829 (0.6%)

AIRC: Legislative Grid Map Option 2





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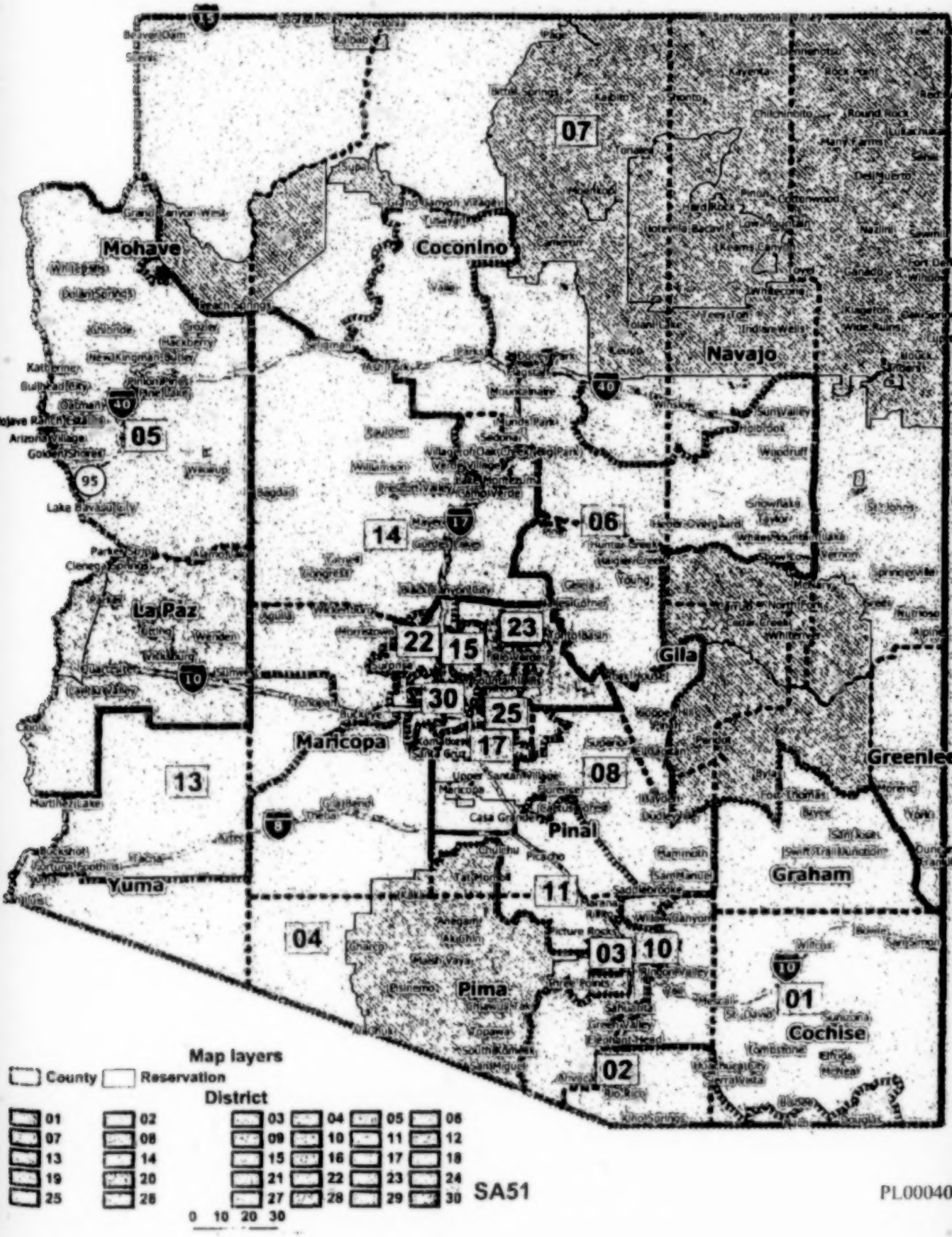
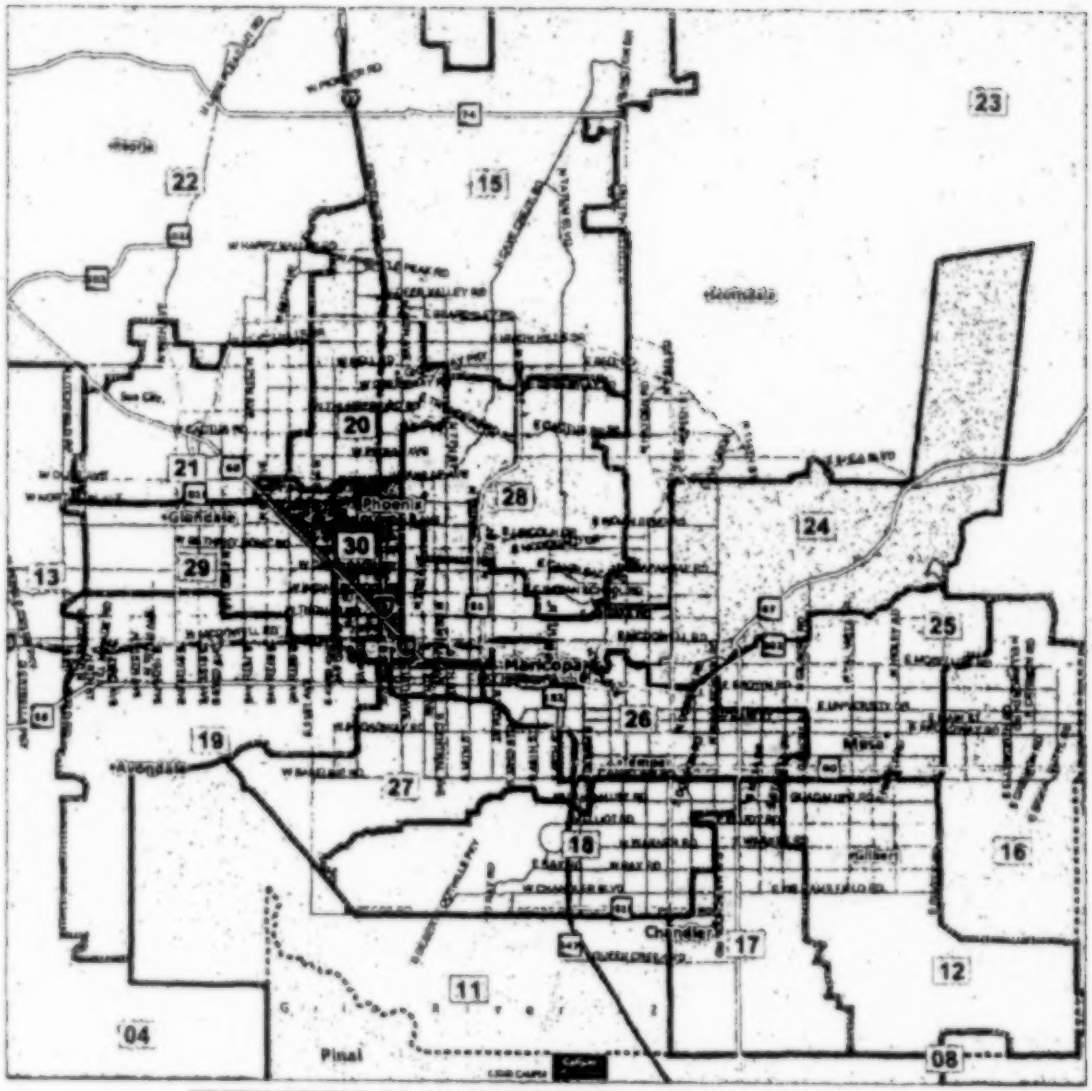
Commission Approved Legislative Draft Map



Commission Approved Legislative Draft Map

Maricopa County



Map layers

County City Reservation

District

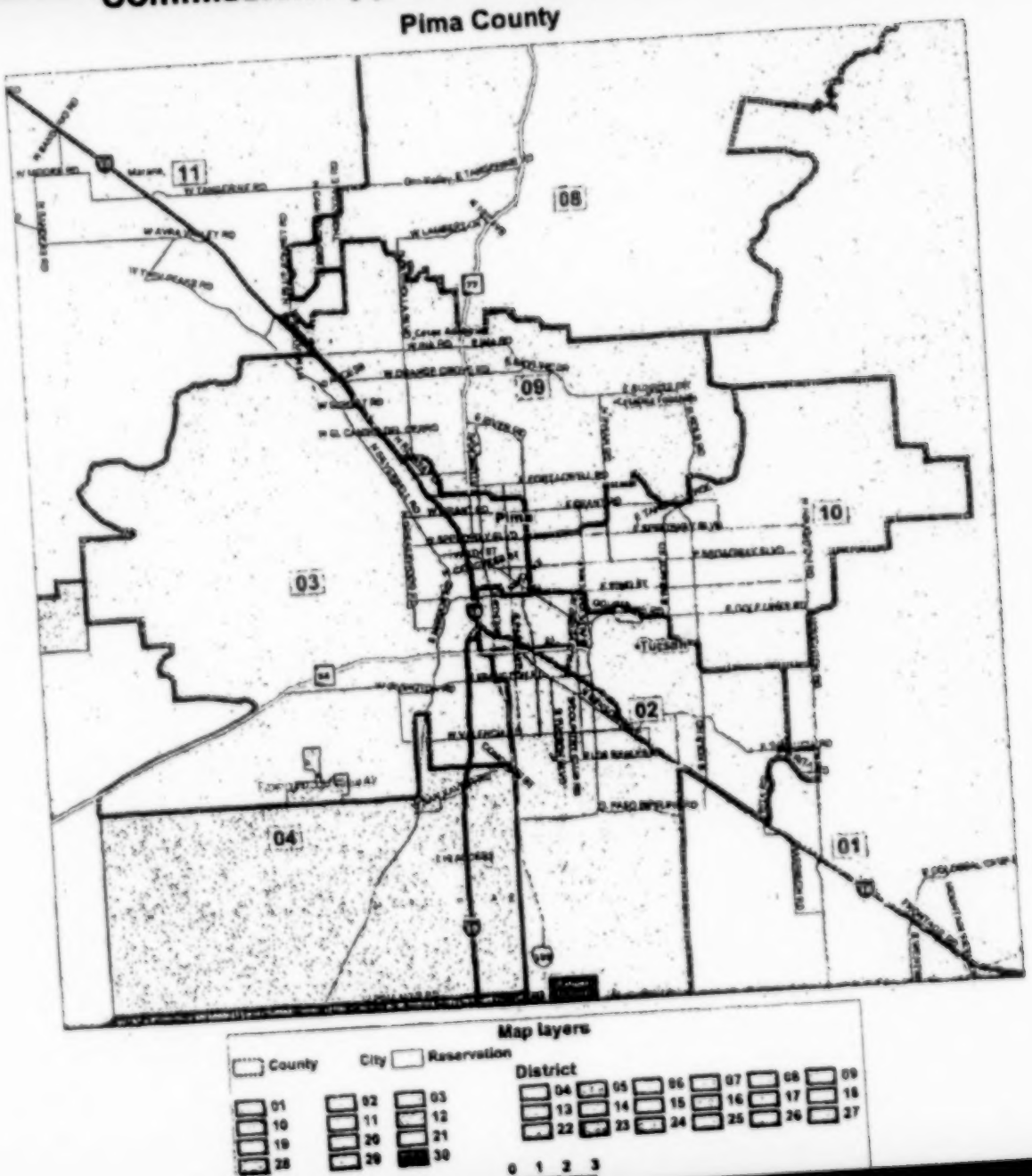
01 02 03 04 05 06 07 08 09
10 11 12 13 14 15 16 17 18
19 20 21 22 23 24 25 26 27
28 29 30

SA52

PL00040

Commission Approved Legislative

Pima County



Commission Approved Legislative Draft Map Compactness and Competitiveness Measures

District	Compactness			Competitiveness Index 1			Competitiveness Index 2			Competitiveness Index 3			All Registration			Reg 2-Way	
	Reock	Perimeter	Polsby-Popper	Ave REP %	Ave DEM %	Diff	Ave REP %	Ave DEM %	Diff	Ave REP %	Ave DEM %	Diff	% REP	% DEM	% OTH	% REP	% DEM
1	0.54	636.09	0.31	64.0%	36.0%	28.1%	62.5%	37.5%	25.1%	62.3%	37.7%	24.5%	42.2%	26.2%	31.6%	61.7%	38.3%
2	0.19	539.21	0.13	39.0%	61.0%	22.1%	38.1%	61.9%	23.7%	35.8%	64.2%	28.4%	20.7%	46.0%	33.3%	31.1%	68.9%
3	0.62	82.88	0.33	32.3%	67.7%	35.4%	31.9%	68.1%	36.3%	30.2%	69.8%	39.7%	18.3%	49.9%	31.9%	26.8%	73.2%
4	0.28	767.23	0.25	49.7%	50.3%	0.6%	48.9%	51.1%	2.2%	46.1%	53.9%	7.7%	26.4%	38.6%	35.0%	40.6%	59.4%
5	0.32	713.68	0.30	69.3%	30.7%	38.5%	65.5%	34.5%	31.1%	64.4%	35.6%	28.7%	39.5%	24.1%	36.4%	62.1%	37.9%
6	0.32	1048.35	0.11	57.9%	42.1%	15.9%	55.4%	44.6%	10.9%	56.0%	44.0%	11.9%	38.4%	29.0%	32.7%	57.0%	43.0%
7	0.31	1784.43	0.17	35.3%	64.7%	29.4%	34.9%	65.1%	30.3%	32.0%	68.0%	36.0%	19.0%	53.6%	27.3%	26.2%	73.8%
8	0.39	499.96	0.17	58.5%	41.5%	16.9%	56.8%	43.2%	13.7%	55.6%	44.4%	11.2%	36.2%	32.0%	31.8%	53.1%	46.9%
9	0.38	58.60	0.33	48.1%	51.9%	3.7%	47.1%	52.9%	5.9%	47.2%	52.8%	5.7%	33.2%	36.9%	30.0%	47.4%	52.6%
10	0.40	55.29	0.35	48.7%	51.3%	2.7%	47.5%	52.5%	5.1%	47.2%	52.8%	5.5%	33.0%	37.4%	29.5%	46.8%	53.2%
11	0.35	402.23	0.22	58.2%	41.8%	16.5%	55.9%	44.1%	11.8%	54.2%	45.8%	8.4%	32.7%	31.7%	35.6%	50.8%	49.2%
12	0.40	54.77	0.40	68.4%	31.6%	36.8%	66.1%	33.9%	32.3%	67.3%	32.7%	34.5%	47.0%	20.6%	32.4%	69.6%	30.4%
13	0.26	453.92	0.28	65.7%	34.3%	31.3%	63.3%	36.7%	26.6%	62.7%	37.3%	25.5%	40.1%	24.9%	35.0%	61.6%	38.4%
14	0.49	628.58	0.29	68.3%	31.7%	36.7%	65.8%	34.2%	31.5%	66.6%	33.4%	33.3%	45.8%	21.2%	32.9%	68.4%	31.6%
15	0.51	86.41	0.33	64.0%	36.0%	28.1%	61.5%	38.5%	23.0%	62.5%	37.5%	25.0%	41.8%	23.1%	35.2%	64.4%	35.6%
16	0.59	75.39	0.43	64.1%	35.9%	28.2%	61.4%	38.6%	22.9%	61.7%	38.3%	23.5%	38.9%	23.5%	37.5%	62.3%	37.7%
17	0.46	42.94	0.44	60.4%	39.6%	20.8%	58.1%	41.9%	16.2%	59.1%	40.9%	18.1%	39.4%	25.3%	35.3%	60.9%	39.1%
18	0.30	52.77	0.37	53.5%	46.5%	7.0%	51.6%	48.4%	3.2%	53.0%	47.0%	6.0%	36.9%	29.3%	33.9%	55.7%	44.3%
19	0.38	66.63	0.31	37.5%	62.5%	25.0%	36.9%	63.1%	26.2%	35.6%	64.4%	28.9%	19.7%	40.2%	40.2%	32.9%	67.1%
20	0.38	41.13	0.39	59.8%	40.2%	19.5%	57.8%	42.2%	15.7%	57.5%	42.5%	15.0%	37.1%	28.2%	34.7%	56.9%	43.1%
21	0.51	40.90	0.47	60.4%	39.6%	20.9%	58.5%	41.5%	17.0%	58.1%	41.9%	16.3%	38.7%	28.7%	32.5%	57.4%	42.6%
22	0.37	157.24	0.24	66.3%	33.7%	32.6%	64.3%	35.7%	28.6%	65.0%	35.0%	30.1%	45.6%	22.9%	31.5%	66.6%	33.4%
23	0.33	265.15	0.23	64.6%	35.4%	29.3%	62.3%	37.7%	24.6%	64.2%	35.8%	28.4%	45.6%	21.4%	33.0%	68.0%	32.0%
24	0.19	107.97	0.18	40.5%	59.5%	18.9%	39.4%	60.6%	21.2%	39.5%	60.5%	21.0%	25.3%	38.4%	36.4%	39.7%	60.3%
25	0.48	44.51	0.40	66.3%	33.7%	32.7%	64.6%	35.4%	29.1%	65.3%	34.7%	30.7%	45.9%	22.7%	31.4%	66.9%	33.1%
26	0.42	35.29	0.43	45.2%	54.8%	9.6%	43.6%	56.4%	12.9%	44.4%	55.6%	11.3%	27.6%	32.4%	40.1%	46.0%	54.0%
27	0.37	58.20	0.30	28.1%	71.9%	43.9%	27.4%	72.6%	45.1%	26.2%	73.8%	47.6%	14.8%	47.6%	37.7%	23.7%	76.3%
28	0.66	48.60	0.43	57.3%	42.7%	14.6%	56.0%	44.0%	12.0%	57.3%	42.7%	14.6%	42.1%	28.2%	29.6%	59.9%	40.1%
29	0.34	34.21	0.50	40.1%	59.9%	19.8%	39.6%	60.4%	20.7%	38.2%	61.8%	23.6%	21.5%	39.4%	39.0%	35.3%	64.7%
30	0.33	29.82	0.44	43.5%	56.5%	13.1%	42.7%	57.3%	14.5%	41.3%	58.7%	17.5%	23.9%	38.6%	37.4%	38.3%	61.7%
		8912.38															

Index 1- Ave % in 2008 and 2010 (all races given equal weight)
Index 2- Ave % in 2008 and 2010 (races given equal weight within year and all years given equal weight)
Index 3- Ave % in 2008, 2010, and Registration (2/3 index 2 and 1/3 major party registration)

COMMISSIONERS
Colleen Coyle Mathis, *Chair*
Scott Day Freeman, *Vice Chair*
José M. Herrera, *Vice Chair*
Linda C. McNulty
Richard P. Stertz

INDEPENDENT REDISTRICTING COMMISSION
1100 West Washington Street
Phoenix, Arizona 85007

Raymond F. Bladine
EXECUTIVE DIRECTOR

CERTIFICATION OF ESTABLISHMENT OF LEGISLATIVE DISTRICTS

By the

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

On January 17, 2012, the Arizona Independent Redistricting Commission met in a public meeting in Phoenix, Arizona and, having applied the provisions of Article IV, Part 2, Section 1 of the Arizona Constitution, certified to the Arizona Secretary of State the establishment of Arizona's thirty legislative districts as set forth in the "Final Legislative Districts," attached hereto, for all state legislative elections through the year 2020.

AFFIRMED by the undersigned, duly appointed chair on behalf of the Arizona Independent Redistricting Commission.

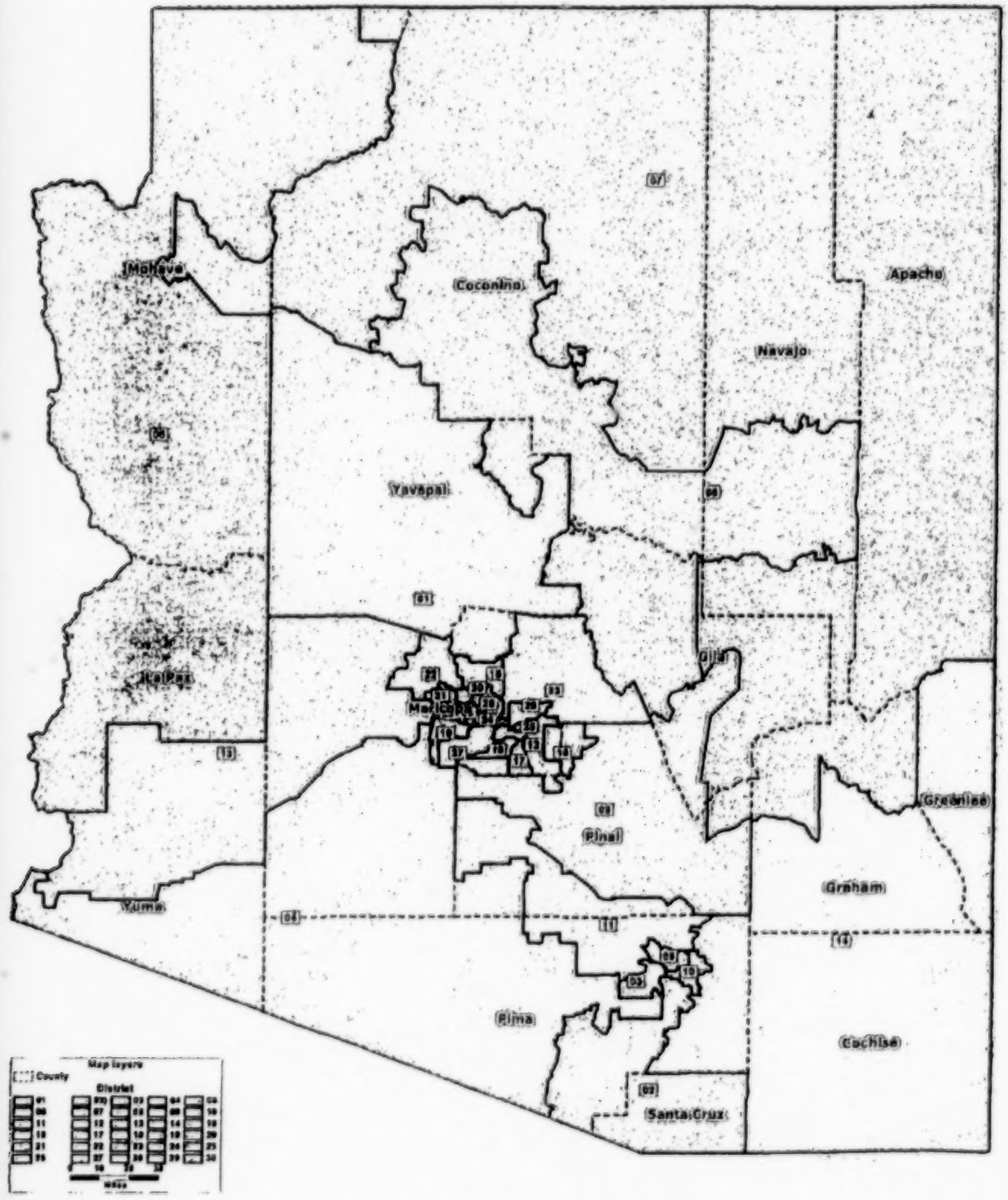
Colleen C. Mathis
COLLEEN MATHIS
Chair

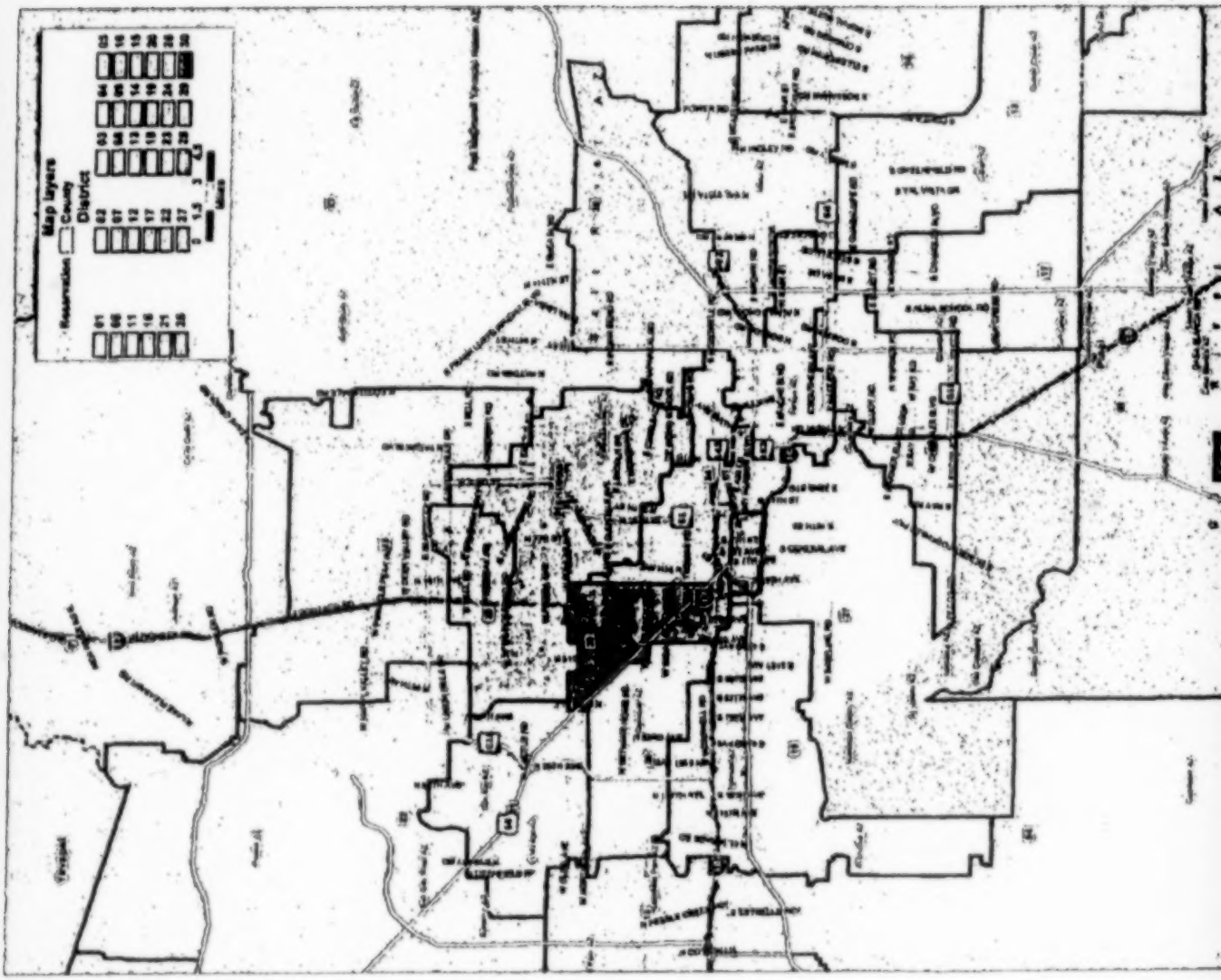
ATTEST to receipt hereof at the Capitol in Phoenix on the 17th day of January, 2012:

Ken Bennett
KEN BENNETT
Secretary of State

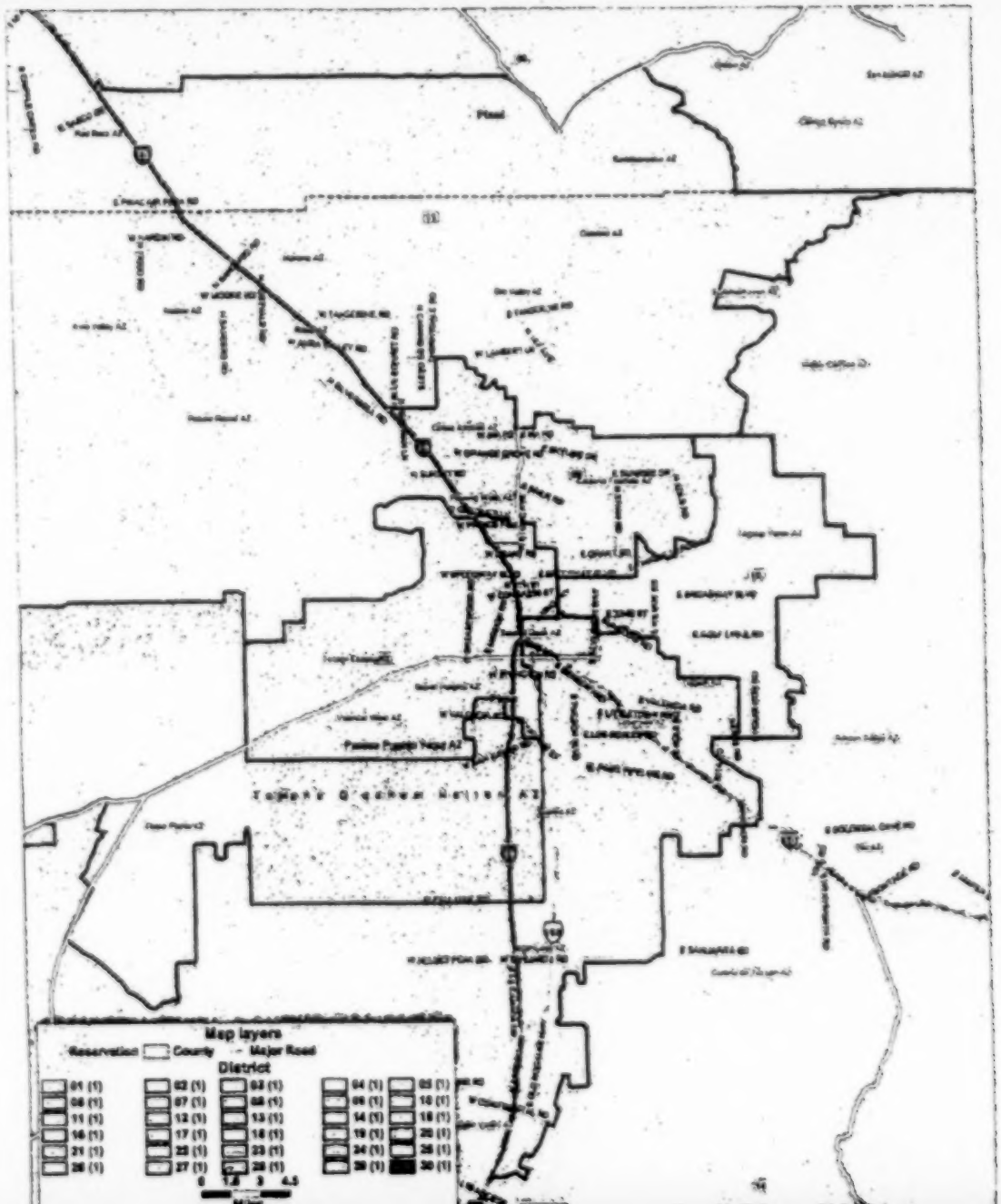
(602) 542-5221 FAX (602) 542-5236 WWW.AZREDISTRICTING.ORG

Final Legislative Districts




Map Layers
County
District

Final Legislative Districts - Approved 1/17/12 - Pima County



Final Legislative Districts - Approved 1/17/12 - Population Breakdown

District	Population	Deviation from Ideal Population		Hispanic Population		Non-Hispanic (NH) White		NH African American		NH Native American		NH Asian		NH Hawaiian		NH Multi-Race and Other	
		#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
1	216,451	3,383	1.6%	24,035	11.1%	181,967	84.1%	1,913	0.9%	1,789	0.8%	2,812	1.3%	205	0.1%	3,730	1.7%
2	204,615	-8,452	-4.0%	121,900	59.6%	69,116	33.8%	5,909	2.9%	2,702	1.3%	2,302	1.1%	191	0.1%	2,495	1.2%
3	204,613	-8,454	-4.0%	115,569	56.5%	67,222	32.9%	6,053	3.0%	7,611	3.7%	4,750	2.3%	189	0.1%	3,219	1.6%
4	204,143	-8,924	-4.2%	123,594	60.5%	58,192	28.5%	5,891	2.9%	11,559	5.7%	2,083	1.0%	198	0.1%	2,626	1.3%
5	219,040	5,972	2.8%	34,316	15.7%	172,081	78.6%	1,822	0.8%	4,609	2.1%	2,106	1.0%	320	0.1%	3,786	1.7%
6	214,244	1,176	0.6%	33,176	15.5%	159,161	74.3%	2,004	0.9%	13,062	6.1%	2,406	1.1%	230	0.1%	4,205	2.0%
7	203,026	-10,041	-4.7%	13,878	6.8%	50,373	24.8%	914	0.5%	133,830	65.9%	757	0.4%	78	0.0%	3,196	1.6%
8	208,422	-4,645	-2.2%	72,456	34.8%	104,152	50.0%	9,211	4.4%	14,534	7.0%	3,042	1.5%	1,261	0.6%	3,766	1.8%
9	213,224	156	0.1%	46,661	21.9%	146,025	68.5%	5,917	2.8%	2,065	1.0%	7,573	3.6%	317	0.1%	4,666	2.2%
10	211,073	-1,994	-0.9%	49,128	23.3%	138,868	65.8%	9,556	4.5%	1,807	0.9%	6,076	2.9%	425	0.2%	5,213	2.5%
11	213,377	309	0.1%	48,249	22.6%	145,091	68.0%	7,160	3.4%	3,108	1.5%	5,124	2.4%	273	0.1%	4,372	2.0%
12	221,735	8,667	4.1%	34,578	15.6%	162,476	73.3%	6,797	3.1%	1,385	0.6%	10,823	4.9%	377	0.2%	5,299	2.4%
13	211,701	-1,366	-0.6%	66,106	31.2%	126,954	60.0%	7,530	3.6%	1,757	0.8%	4,990	2.4%	299	0.1%	4,065	1.9%
14	217,693	4,625	2.2%	67,082	30.8%	132,552	60.9%	7,070	3.2%	1,851	0.9%	3,654	1.7%	506	0.2%	4,978	2.3%
15	214,941	1,873	0.9%	22,035	10.3%	172,110	80.1%	4,086	1.9%	1,359	0.6%	10,720	5.0%	254	0.1%	4,377	2.0%
16	220,157	7,089	3.3%	36,222	16.5%	169,113	76.8%	4,816	2.2%	1,776	0.8%	3,734	1.7%	363	0.2%	4,133	1.9%
17	221,174	8,106	3.8%	47,472	21.5%	140,660	63.6%	9,238	4.2%	2,221	1.0%	16,160	7.3%	362	0.2%	5,061	2.3%
18	218,677	5,609	2.6%	31,641	14.5%	153,658	70.3%	10,190	4.7%	3,190	1.5%	13,997	6.4%	549	0.3%	5,452	2.5%
19	207,088	-5,979	-2.8%	134,862	65.1%	45,004	21.7%	16,061	7.8%	2,350	1.1%	4,855	2.3%	365	0.2%	3,591	1.7%
20	218,167	5,099	2.4%	46,856	21.5%	148,114	67.9%	8,325	3.8%	2,947	1.4%	6,714	3.1%	373	0.2%	4,838	2.2%
21	216,242	3,174	1.5%	53,053	24.5%	143,644	66.4%	8,819	4.1%	1,562	0.7%	4,485	2.1%	307	0.1%	4,372	2.0%
22	215,912	2,844	1.3%	22,375	10.4%	175,513	81.3%	5,822	2.7%	839	0.4%	7,117	3.3%	276	0.1%	3,970	1.8%
23	213,451	383	0.2%	12,212	5.7%	186,190	87.2%	2,833	1.3%	1,616	0.8%	6,889	3.2%	168	0.1%	3,543	1.7%
24	206,659	-6,408	-3.0%	85,381	41.3%	92,695	44.9%	13,046	6.3%	6,716	3.2%	4,291	2.1%	330	0.2%	4,200	2.0%
25	220,795	7,727	3.6%	43,023	19.5%	160,255	72.6%	5,837	2.6%	3,655	1.7%	3,397	1.5%	536	0.2%	4,092	1.9%
26	213,659	591	0.3%	82,251	38.5%	96,917	45.4%	11,034	5.2%	10,155	4.8%	7,254	3.4%	1,031	0.5%	5,017	2.3%
27	204,195	-8,872	-4.2%	116,568	57.1%	40,058	19.6%	29,982	14.7%	7,628	3.7%	5,757	2.8%	436	0.2%	3,766	1.8%
28	218,713	5,645	2.6%	48,111	22.0%	152,121	69.6%	5,919	2.7%	2,958	1.4%	5,492	2.5%	244	0.1%	3,868	1.8%
29	211,067	-2,000	-0.9%	142,923	67.7%	45,815	21.7%	12,402	5.9%	2,119	1.0%	4,250	2.0%	184	0.1%	3,374	1.6%
30	207,763	-5,304	-2.5%	119,436	57.5%	59,550	28.7%	12,944	6.2%	4,666	2.2%	6,899	3.3%	312	0.2%	3,956	1.9%

Final Legislative Districts - Approved 1/17/12 - Voting Age Population Breakdown

District	Voting Age Pop	Hispanic Voting Age Pop		Non Hispanic (NH) White Voting Age		NH African American		NH Native American Voting		NH Asian Voting Age Pop		NH Hawaiian Voting Age		NH Multi-Race and	
		#	%	#	%	#	%	#	%	#	%	#	%	#	%
1	170,136	15,190	8.9%	147,538	86.7%	1,457	0.9%	1,386	0.8%	2,189	1.3%	174	0.1%	2,202	1.3%
2	148,925	78,653	52.8%	60,416	40.6%	4,539	3.0%	1,933	1.3%	1,881	1.3%	152	0.1%	1,351	0.9%
3	154,745	77,451	50.1%	60,946	39.4%	4,632	3.0%	5,111	3.3%	4,225	2.7%	139	0.1%	2,241	1.4%
4	141,485	78,816	55.7%	47,013	33.2%	4,529	3.2%	7,926	5.6%	1,599	1.1%	158	0.1%	1,444	1.0%
5	174,701	22,009	12.6%	143,620	82.2%	1,424	0.8%	3,291	1.9%	1,773	1.0%	246	0.1%	2,338	1.3%
6	169,965	21,327	12.5%	132,925	78.2%	1,639	1.0%	9,210	5.4%	2,092	1.2%	186	0.1%	2,586	1.5%
7	139,259	8,545	6.1%	40,013	28.7%	778	0.6%	87,851	63.1%	590	0.4%	61	0.0%	1,421	1.0%
8	153,405	48,030	31.3%	81,918	53.4%	7,014	4.6%	10,829	7.1%	2,524	1.6%	1,141	0.7%	1,949	1.3%
9	172,120	31,504	18.3%	125,635	73.0%	4,346	2.5%	1,550	0.9%	6,038	3.5%	222	0.1%	2,825	1.6%
10	166,639	32,487	19.5%	117,413	70.5%	7,195	4.3%	1,339	0.8%	4,970	3.0%	326	0.2%	2,909	1.7%
11	160,257	29,474	18.4%	117,449	73.3%	4,935	3.1%	2,131	1.3%	3,890	2.4%	185	0.1%	2,193	1.4%
12	147,754	20,504	13.9%	111,743	75.6%	4,497	3.0%	930	0.6%	7,639	5.2%	258	0.2%	2,183	1.5%
13	156,650	40,759	26.0%	103,306	65.9%	5,333	3.4%	1,363	0.9%	3,675	2.3%	218	0.1%	1,996	1.3%
14	163,012	43,999	27.0%	105,951	65.0%	5,448	3.3%	1,479	0.9%	3,034	1.9%	388	0.2%	2,713	1.7%
15	162,579	13,970	8.6%	133,974	82.4%	3,037	1.9%	973	0.6%	8,176	5.0%	193	0.1%	2,256	1.4%
16	164,719	21,337	13.0%	133,781	81.2%	3,353	2.0%	1,260	0.8%	2,806	1.7%	245	0.1%	1,937	1.2%
17	161,935	29,525	18.2%	110,213	68.1%	6,526	4.0%	1,515	0.9%	11,568	7.1%	269	0.2%	2,319	1.4%
18	168,966	21,459	12.7%	124,070	73.4%	7,413	4.4%	2,280	1.3%	10,644	6.3%	384	0.2%	2,716	1.6%
19	133,549	80,622	60.4%	35,275	26.4%	10,325	7.7%	1,639	1.2%	3,645	2.7%	278	0.2%	1,765	1.3%
20	166,570	29,476	17.7%	120,748	72.5%	6,029	3.6%	2,102	1.3%	5,315	3.2%	268	0.2%	2,632	1.6%
21	164,688	32,423	19.7%	119,158	72.4%	6,140	3.7%	1,098	0.7%	3,531	2.1%	204	0.1%	2,134	1.3%
22	167,688	13,708	8.2%	141,890	84.6%	4,149	2.5%	586	0.3%	5,277	3.1%	206	0.1%	1,872	1.1%
23	176,271	8,631	4.9%	156,821	89.0%	2,284	1.3%	1,189	0.7%	5,263	3.0%	121	0.1%	1,962	1.1%
24	157,984	53,875	34.1%	82,855	52.4%	9,883	6.3%	4,861	3.1%	3,635	2.3%	237	0.2%	2,638	1.7%
25	167,944	26,254	15.6%	129,933	77.4%	4,217	2.5%	2,399	1.4%	2,711	1.6%	378	0.2%	2,052	1.2%
26	164,423	52,537	32.0%	85,964	52.3%	8,347	5.1%	6,994	4.3%	6,575	4.0%	705	0.4%	3,301	2.0%
27	140,329	73,051	52.1%	34,090	24.3%	21,210	15.1%	5,177	3.7%	4,502	3.2%	312	0.2%	1,987	1.4%
28	169,608	30,085	17.7%	126,340	74.5%	4,391	2.6%	2,136	1.3%	4,405	2.6%	174	0.1%	2,077	1.2%
29	135,426	83,827	61.9%	36,737	27.1%	8,345	6.2%	1,459	1.1%	3,193	2.4%	135	0.1%	1,730	1.3%
30	141,271	71,675	50.7%	50,160	35.5%	8,834	6.3%	3,210	2.3%	4,952	3.5%	237	0.2%	2,203	1.6%

Final Legislative Districts - Approved 1/17/12 - Compactness and Competitiveness Measures

District	Compactness			Competitiveness Index 2			Competitiveness Index 3			Competitiveness Index 4			Competitiveness Index 5		
	Reock	Perimeter	Polsby Popper	Ave. REP %	Ave. DEM %	Diff	Ave. REP %	Ave. DEM %	Diff	Ave. REP %	Ave. DEM %	Diff	Ave. REP %	Ave. DEM %	Diff
1	0.46	545.11	0.34	66.4%	33.6%	32.8%	67.6%	32.4%	35.2%	67.2%	32.8%	34.4%	67.8%	32.2%	35.6%
2	0.51	336.82	0.28	42.8%	57.2%	14.4%	40.8%	59.2%	18.4%	45.9%	54.1%	8.2%	44.1%	55.9%	11.8%
3	0.48	69.83	0.35	31.0%	69.0%	38.0%	29.4%	70.6%	41.2%	35.0%	65.0%	30.0%	33.2%	66.8%	33.6%
4	0.29	782.51	0.24	45.5%	54.5%	9.0%	42.9%	57.1%	14.2%	48.6%	51.4%	2.8%	46.4%	53.6%	7.2%
5	0.25	1027.87	0.20	65.6%	34.4%	31.2%	64.6%	35.4%	29.2%	65.4%	34.6%	30.8%	64.9%	35.1%	29.8%
6	0.32	1072.94	0.11	54.7%	45.3%	9.4%	55.3%	44.7%	10.6%	55.9%	44.1%	11.8%	56.0%	44.0%	12.0%
7	0.40	1781.57	0.15	36.3%	63.7%	27.4%	32.9%	67.1%	34.2%	39.6%	60.4%	20.8%	37.0%	63.0%	26.0%
8	0.37	482.89	0.23	51.3%	48.7%	2.6%	48.5%	51.5%	3.0%	53.1%	46.9%	6.2%	51.1%	48.9%	2.2%
9	0.38	58.26	0.34	46.7%	53.3%	6.6%	46.9%	53.1%	6.2%	49.5%	50.5%	1.0%	49.1%	50.9%	1.8%
10	0.47	72.46	0.24	48.0%	52.0%	4.0%	47.8%	52.2%	4.4%	50.7%	49.3%	1.4%	50.1%	49.9%	0.2%
11	0.26	376.07	0.17	58.7%	41.3%	17.4%	58.5%	41.5%	17.0%	60.3%	39.7%	20.6%	59.9%	40.1%	19.8%
12	0.34	68.30	0.35	66.1%	33.9%	32.2%	67.2%	32.8%	34.4%	68.3%	31.7%	36.6%	68.6%	31.4%	37.2%
13	0.29	509.56	0.28	64.7%	35.3%	29.4%	63.8%	36.2%	27.6%	65.9%	34.1%	31.8%	65.1%	34.9%	30.2%
14	0.44	676.02	0.34	60.6%	39.4%	21.2%	59.3%	40.7%	18.6%	61.7%	38.3%	23.4%	60.7%	39.3%	21.4%
15	0.39	75.37	0.33	61.5%	38.5%	23.0%	62.5%	37.5%	25.0%	63.8%	36.2%	27.6%	64.0%	36.0%	28.0%
16	0.54	76.18	0.43	61.2%	38.8%	22.4%	61.5%	38.5%	23.0%	63.2%	36.8%	26.4%	63.0%	37.0%	26.0%
17	0.48	40.05	0.53	57.9%	42.1%	15.8%	58.8%	41.2%	17.6%	60.8%	39.2%	21.6%	60.8%	39.2%	21.6%
18	0.23	50.22	0.30	51.5%	48.5%	3.0%	52.9%	47.1%	5.8%	55.0%	45.0%	10.0%	55.1%	44.9%	10.2%
19	0.38	69.22	0.28	37.1%	62.9%	25.8%	35.8%	64.2%	28.4%	43.6%	56.4%	12.8%	41.5%	58.5%	17.0%
20	0.37	37.31	0.39	56.6%	43.4%	13.2%	56.4%	43.6%	12.8%	59.4%	40.6%	18.8%	58.7%	41.3%	17.4%
21	0.62	39.88	0.51	57.8%	42.2%	15.6%	57.4%	42.6%	14.8%	59.9%	40.1%	19.8%	59.2%	40.8%	18.4%
22	0.49	109.42	0.34	63.9%	36.1%	27.8%	64.6%	35.4%	29.2%	64.8%	35.2%	29.6%	65.0%	35.0%	30.0%
23	0.42	228.33	0.30	62.0%	38.0%	24.0%	63.9%	36.1%	27.8%	63.6%	36.4%	27.2%	64.4%	35.6%	28.8%
24	0.25	43.78	0.25	38.4%	61.6%	23.2%	38.5%	61.5%	23.0%	43.0%	57.0%	14.0%	42.2%	57.8%	15.6%
25	0.30	57.85	0.29	64.6%	35.4%	29.2%	65.3%	34.7%	30.6%	66.6%	33.4%	33.2%	66.7%	33.3%	33.4%
26	0.27	85.80	0.21	41.9%	58.1%	16.2%	42.6%	57.4%	14.8%	47.1%	52.9%	5.8%	46.5%	53.5%	7.0%
27	0.45	121.81	0.22	27.4%	72.6%	45.2%	26.1%	73.9%	47.8%	32.1%	67.9%	35.8%	30.4%	69.6%	39.2%
28	0.56	50.69	0.38	54.8%	45.2%	9.6%	55.8%	44.2%	11.6%	57.6%	42.4%	15.2%	57.6%	42.4%	15.2%
29	0.33	37.11	0.42	39.4%	60.6%	21.2%	38.0%	62.0%	24.0%	45.0%	55.0%	10.0%	43.1%	56.9%	13.8%
30	0.34	31.10	0.41	42.6%	57.4%	14.8%	41.2%	58.8%	17.6%	47.2%	52.8%	5.6%	45.4%	54.6%	9.2%
	9014.31														

Index 2: Average of 2008 and 2010, each year weighted equally
Index 3: Average of 2008, 2010 and % of major party Registration, each of the three components weighted equally
Index 4: Average of 2004, 2006, 2008 and 2010, each year weighted equally
Index 5: Average of 2004, 2006, 2008, 2010 and % of major party registration, each component weighted equally

District	Competitiveness Index 6			Competitiveness Index 7			Competitiveness Index 8			Competitiveness Index 9			All Registration			Reg 2-Way	
	Ave. REP %	Ave. DEM %	Diff	Ave. REP %	Ave. DEM %	Diff	Ave. REP %	Ave. DEM %	Diff	Ave. REP %	Ave. DEM %	Diff	% REP	% DEM	% OTH	% REP	% DEM
1	65.9%	34.1%	31.8%	66.7%	33.3%	33.4%	65.8%	34.2%	31.6%	66.9%	33.1%	33.8%	47.1%	20.2%	32.7%	70.0%	30.0%
2	43.6%	56.4%	12.8%	42.2%	57.8%	15.6%	43.2%	56.8%	13.6%	41.6%	58.4%	16.8%	24.5%	42.3%	33.2%	36.7%	63.3%
3	31.8%	68.2%	36.4%	30.6%	69.4%	38.8%	31.3%	68.7%	37.4%	30.0%	70.0%	40.0%	17.7%	50.1%	32.2%	26.1%	73.9%
4	46.3%	53.7%	7.4%	44.6%	55.4%	10.8%	45.8%	54.2%	8.4%	43.8%	56.2%	12.4%	24.5%	40.4%	35.1%	37.8%	62.2%
5	64.2%	35.8%	28.4%	63.9%	36.1%	27.8%	64.5%	35.5%	29.0%	64.1%	35.9%	28.2%	39.7%	23.7%	36.6%	62.6%	37.4%
6	53.7%	46.3%	7.4%	54.3%	45.7%	8.6%	53.8%	46.2%	7.6%	54.5%	45.5%	9.0%	37.8%	29.0%	33.1%	56.6%	43.4%
7	37.1%	62.9%	25.8%	34.9%	65.1%	30.2%	36.5%	63.5%	27.0%	34.0%	66.0%	32.0%	19.3%	53.8%	26.9%	26.4%	73.6%
8	51.4%	48.6%	2.8%	49.7%	50.3%	0.6%	51.1%	48.9%	2.2%	49.0%	51.0%	2.0%	28.5%	38.1%	33.4%	42.8%	57.2%
9	46.7%	53.3%	6.6%	46.8%	53.2%	6.4%	46.4%	53.6%	7.2%	46.6%	53.4%	6.8%	33.2%	37.0%	29.9%	47.3%	52.7%
10	48.0%	52.0%	4.0%	47.9%	52.1%	4.2%	47.8%	52.2%	4.4%	47.7%	52.3%	4.6%	33.5%	37.0%	29.5%	47.5%	52.5%
11	58.4%	41.6%	16.8%	58.3%	41.7%	16.6%	58.3%	41.7%	16.6%	58.2%	41.8%	16.4%	38.9%	27.9%	33.2%	58.2%	41.8%
12	66.6%	33.4%	33.2%	67.2%	32.8%	34.4%	66.2%	33.8%	32.4%	67.0%	33.0%	34.0%	47.0%	20.6%	32.4%	69.5%	30.5%
13	64.7%	35.3%	29.4%	64.1%	35.9%	28.2%	64.5%	35.5%	29.0%	63.8%	36.2%	27.6%	41.2%	25.3%	33.6%	62.0%	38.0%
14	60.5%	39.5%	21.0%	59.8%	40.2%	19.6%	60.3%	39.7%	20.6%	59.5%	40.5%	19.0%	39.0%	29.7%	31.3%	56.8%	43.2%
15	62.0%	38.0%	24.0%	62.5%	37.5%	25.0%	61.5%	38.5%	23.0%	62.3%	37.7%	24.6%	42.8%	23.5%	33.8%	64.6%	35.4%
16	61.5%	38.5%	23.0%	61.6%	38.4%	23.2%	61.1%	38.9%	22.2%	61.4%	38.6%	22.8%	38.7%	23.6%	37.7%	62.1%	37.9%
17	58.8%	41.2%	17.6%	59.2%	40.8%	18.4%	58.2%	41.8%	16.4%	58.8%	41.2%	17.6%	39.3%	25.4%	35.3%	60.7%	39.3%
18	52.3%	47.7%	4.6%	53.0%	47.0%	6.0%	51.7%	48.3%	3.4%	52.7%	47.3%	5.4%	36.9%	29.3%	33.7%	55.7%	44.3%
19	41.2%	58.8%	17.6%	39.6%	60.4%	20.8%	39.6%	60.4%	20.8%	38.0%	62.0%	24.0%	19.8%	39.9%	40.2%	33.2%	66.8%
20	57.5%	42.5%	15.0%	57.2%	42.8%	14.4%	56.9%	43.1%	13.8%	56.7%	43.3%	13.4%	36.8%	28.8%	34.4%	56.1%	43.9%
21	58.3%	41.7%	16.6%	58.0%	42.0%	16.0%	57.9%	42.1%	15.8%	57.6%	42.4%	15.2%	37.7%	28.9%	33.4%	56.6%	43.4%
22	63.2%	36.8%	26.4%	63.8%	36.2%	27.6%	63.2%	36.8%	26.4%	63.9%	36.1%	27.8%	44.9%	23.0%	32.1%	66.1%	33.9%
23	61.8%	38.2%	23.6%	62.9%	37.1%	25.8%	61.6%	38.4%	23.2%	63.1%	36.9%	26.2%	45.2%	21.7%	33.1%	67.6%	32.4%
24	40.1%	59.9%	19.8%	39.8%	60.2%	20.4%	39.2%	60.8%	21.6%	39.1%	60.9%	21.8%	24.8%	39.1%	36.1%	38.8%	61.2%
25	65.1%	34.9%	30.2%	65.5%	34.5%	31.0%	64.6%	35.4%	29.2%	65.2%	34.8%	30.4%	45.9%	22.7%	31.4%	66.9%	33.1%
26	44.3%	55.7%	11.4%	44.2%	55.8%	11.6%	43.2%	56.8%	13.6%	43.4%	56.6%	13.2%	25.8%	33.0%	41.1%	43.9%	56.1%
27	29.3%	70.7%	41.4%	28.1%	71.9%	43.8%	28.5%	71.5%	43.0%	27.2%	72.8%	45.6%	14.6%	47.8%	37.6%	23.4%	76.6%
28	55.4%	44.6%	10.8%	55.9%	44.1%	11.8%	54.8%	45.2%	9.6%	55.6%	44.4%	11.2%	40.2%	29.2%	30.6%	57.9%	42.1%
29	43.0%	57.0%	14.0%	41.4%	58.6%	17.2%	41.5%	58.5%	17.0%	39.9%	60.1%	20.2%	21.5%	39.5%	39.0%	35.2%	64.8%
30	45.0%	55.0%	10.0%	43.7%	56.3%	12.6%	43.9%	56.1%	12.2%	42.5%	57.5%	15.0%	24.0%	38.6%	37.4%	38.3%	61.7%

Index 6: Average of 2004, 2006, 2008 and 2010, each year weighted equally, Races where one candidate received more than 60% of the 2-way vote removed

Index 7: Average of 2004, 2006, 2008, 2010, and major party registration, each year weighted equally, Races where one candidate received more than 60% removed

Index 8: 1/3 2010, 1/3 2008, and 1/6 2004, and 1/6 2006, Races where one candidate received more than 60% of the 2-way vote removed

Index 9: 1/4 2010, 1/4 2008, 1/8 2006, 1/8 2004, and 1/4 major party registration, Races where one candidate received more than 60% of the 2-way vote removed

PL000494

No. 14-232

IN THE

Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT OF ARIZONA

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Does the desire to gain partisan advantage for one political party justify creating legislative districts of unequal population that deviate from the one-person, one-vote principle of the Equal Protection Clause?

2. Does the desire to obtain favorable preclearance review by the Justice Department permit the creation of legislative districts that deviate from the one-person, one-vote principle? And, even if creating unequal districts to obtain preclearance approval was once justified, is this still a legitimate justification after *Shelby Cnty., Ala.* v. *Holder*, 133 S. Ct. 2612 (2013)?

PARTIES

The appellants here, plaintiffs below, are Wesley W. Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Beth K. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, Karen M. MacKean, and Sherese L. Steffans. These individuals are Arizona citizens and registered voters residing in an over-populated Arizona legislative district.

Appellees, defendants below, are the Arizona Independent Redistricting Commission (the commission or IRC), Colleen Mathis, Linda C. McNulty, Scott D. Freeman, Richard Stertz, and Cid R. Kallen (replacing former Commissioner Jose M. Herrera pursuant to Fed.R.Civ.P. 25(d)), in their official capacity as members of the commission, and Michele Reagan, in her official capacity as Arizona Secretary of State. Michele Reagan replaces Ken Bennett, the former Secretary of State named in his official capacity in previous filings.

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OPINION BELOW

In April 2014, the three-judge district court (Clifton, Silver, Wake, JJ.) entered a *per curiam* decision that is the subject of this appeal. The opinion in *Harris* v. *Ariz. Indep. Redistricting Comm'n*, is published at 993 F. Supp.2d 1042 (D. Ariz. 2014). The *per curiam* opinion is at J.S. App. 3a-81a. Judge Silver's concurrence and dissent is at J.S. App. 82a-104a. Judge Wake's concurrence and dissent is at J.S. App. 105a-145a.

JURISDICTION

A two-judge majority denied the *Harris* voters' Equal Protection challenge. The *Harris* voters timely filed their notice of appeal on June 25, 2014. J.S. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. On June 30, 2015, this Court noted probable jurisdiction.

STATUTES AND CONSTITUTIONAL PROVISIONS

The statutes and constitutional provisions are included in the appendix to appellants' jurisdictional statement.

STATEMENT OF THE CASE

A. Summary of this case.

This is an Equal Protection challenge brought under this Court's one-person, one-vote jurisprudence.[1] See

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1. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

Gray v. *Sanders*, 372 U.S. 368, 380 (1963); *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964); and *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964).

The commission diluted or inflated the votes of almost two million Arizona citizens when the commission intentionally and systematically overpopulated sixteen Republican districts while underpopulating eleven Democrat districts. By overpopulating Republican districts, the commission unfairly diluted the vote of thousands of Arizona citizens. Arizona citizens living in these overpopulated districts have challenged the commission's reapportionment scheme.

The three-judge district court found the commission malapportioned Arizona's legislature for two reasons: (1) the desire to give the Democrat party a political advantage; and, (2) because the commission's lawyer and consultant said the Justice Department would not preclear the reapportionment scheme under section 5 of the Voting Rights Act unless the commission underpopulated eleven districts to create (or attempt to create) minority "ability-to-elect" districts. But neither of these reasons justifies creating unequally-populated legislative districts that dilute the weight of the vote of thousands of Arizona citizens.

If the commission had *equally* reapportioned Arizona voters into legislative districts for the partisan purpose of benefiting the Democrat party we would not be here. The problem is that the commission *unequally* apportioned Arizona voters with the intent of creating an advantage for the Democrat party. And, in doing so, it systematically diluted or enhanced the electoral weight of 3,907,652 Arizona voters. See J.S. Suppl. App. at SA59.

For more than sixty-years this Court has emphasized the constitutional primacy of population equality. *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1271 (2015), is the most recent example.[2]

Nevertheless, two of the three district court judges upheld the commission's unequal reapportionment scheme even when the scheme unequally diluted the weight of thousands of Arizona voters. Judges Clifton and Silver believed that, because the commission's advisors told the commissioners the Justice Department required unequally-populated districts to obtain preclearance under the Voting Rights Act, the commission therefore had a "good faith" belief that it could unequally populate Arizona's legislative districts. This rationale is wrong for two reasons. First, neither the Voting Rights Act nor the Justice Department can require the commission to unequally populate Arizona's legislative districts. The Justice Department has never had the power – nor has it ever claimed the power – to demand States malapportion state legislative districts to obtain preclearance. Second, even if the Voting Rights Act could have once authorized the Justice Department to condition preclearance upon the commission unequally apportioning Arizona's legislative districts, this justification was eliminated by this Court's decision in *Shelby Cnty., Ala.* v. *Holder*, 133 S. Ct. 2612 (2013).

So we are left with this: The commission's reapportionment scheme violates the one-person,

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2. *Id.* ("The requirement that districts have approximately equal populations is a background rule against which redistricting takes place.")

one-vote standard. There is no dispute on this point. And, because the two justifications offered for this malapportionment (gaining partisan advantage and obtaining Justice Department preclearance, especially after *Shelby County*) are not legitimate reasons to deviate from the constitutional one-person, one-vote prerogative, the commission's reapportionment of Arizona's state legislature should be remanded with instructions to redraw Arizona's legislative districts consistent with this Court's one-person, one-vote standard.

B. The Arizona redistricting commission.

Arizona is divided into thirty legislative districts. The voters of each district elect two representatives to the Arizona House and one representative to the Arizona Senate. In most states the decennial reapportionment of legislative districts (both congressional districts and state house and senate districts) is done by the state legislature.[3] But in Arizona this is not so.

In 2000, a citizen initiative amended Arizona's Constitution to "tak[e] the redistricting power away from the Arizona Legislature and put[] it in the hands of a politically neutral commission of citizens who are not active in partisan politics...to create fair districts that are not 'gerrymandered' for any party's or incumbent's

3. Some states use advisory bodies to assist in reapportionment. But Arizona is one of very few states that has removed its state legislative reapportionment process from legislative or electoral oversight. See *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2662 n.6 (2015).

advantage***."[4] This initiative, Proposition 106, aimed to "end[] the practice of gerrymandering and improv[e] voter and candidate participation in elections by creating an independent commission of balanced appointments to oversee the mapping of fair and competitive congressional and legislative districts."[5] Harris, J.S. App. at 57a; see also *id.* at 146a-152a (Ariz. Const. art. IV, pt. 2, § 1(3)-(23)).

This amendment "remove[d] redistricting authority from the Arizona Legislature and vest[ed] that authority in an independent commission ***." *Ariz. State Legislature*, 135 S. Ct. at 2658. The primary purpose for delegating reapportionment to an "independent" commission was "ending the practice of gerrymandering." *Id.* at 2661.

The Arizona Constitution directs the commission to reapportion Arizona's legislature in conformity with six enumerated neutral criteria: (1) The United States Constitution and Voting Rights Act, (2) creating equally-populated districts; (3) geographic compactness and contiguity; (4) preserving communities of interest; (5) geographic features such as municipal and county boundaries; and (6) political competitiveness "if it would create no significant detriment to the other goals." Ariz. Const. art. IV, pt. 2, § 1(14)(F); see also *Harris*, J.S. App.

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4. Arizona Secretary of State, 2000 General Election: Ballot Measures, "Fair Districts, Fair Elections," <http://apps.azsos.gov/election/2000/General/ballotmeasures.htm> (last visited August 25, 2015).

5. Ballot title, "Citizens Independent Redistricting Commission Initiative," available at:

<http://apps.azsos.gov/election/2000/info/pubpamphlet/prop2-C-2000.htm> (last visited August 25, 2015).

at 24a. To reduce the influence of partisanship in Arizona's reapportionment, the Arizona Constitution further provides: "[p]arty registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals." J.S. App. at 151a.

The IRC is a five-member commission. Another unelected commission, the Arizona Commission on Appellate Court Appointments, provides three slates of individuals – one slate of ten Republicans, one slate of ten Democrats, and one slate of five individuals "not registered with any [political] party." *Ariz. Indep. Redistricting Comm'n* v. *Brewer*, 275 P.3d 1267, 1268 (Az. 2012); see also Ariz. Const. art. IV, pt. 2, § 1(3); *Harris*, J.S. App. at 13a-14a. The Republican and Democrat leadership of the Arizona House and Senate select four members of the commission – two Democrats and two Republicans. The Democrats selected Jose Herrera and Linda McNulty and the Republicans selected Scott Freeman and Richard Stertz.

Once designated, these four members select a fifth member from the list of the five persons on the "unaffiliated" slate. *Harris*, J.S. App. 13a. The Republican members noted that the five "unaffiliated" candidates were not truly unaffiliated but were, in practice, aligned with the Democrat party. *Id.* at 14a. Despite these objections the commission appointed Colleen Mathis as the fifth commissioner. *Id.* at 13a. By law, Mathis chaired the commission. *Ibid.*

The commission then selected its mapping consultant and attorneys. Over the objection of the Republican

members, the commission selected a Democrat consultant to draw the map. *Harris*, J.S. App. at 17a-18a. This consultant "had worked for Democratic, independent, and nonpartisan campaigns, but no Republican campaigns." *Id.* at 17a; see also *Ariz. State Legislature*, 135 S. Ct. at 2691. The Democrat commissioners also selected a Democrat attorney of their choice to advise them, but (joined by Chairwoman Mathis) voted to deny Republican members the opportunity to select an attorney of their choice. *Harris*, J.S. App. at 15a-16a. Instead, Mathis and the Democrat members selected an attorney to represent the Republican commissioners. *Id.* at 16a.

Chairwoman Mathis' partisan bias "provoked sufficient controversy [such] that the Governor of Arizona, supported by two-thirds of the Arizona Senate, attempted to remove [Chairwoman Mathis] for 'substantial neglect of duty and gross misconduct in office.'"[6] *Ariz. State Legislature*, 135 S. Ct. at 2691 (citing *Brewer*, 275 P.3d at 1275). The Arizona Supreme Court reinstated Mathis because it concluded removing Mathis exceeded the Governor's authority.[7] *Id.*

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6. "Secretary of State Ken Bennett, in his capacity as Acting Governor while Governor Brewer was out of state sent a letter to Commissioner Mathis removing her from the IRC, effective upon occurrence of two-thirds of the Senate." *Brewer*, 275 P.3d at 1269.

7. The fact that two-thirds of the Arizona Senate and Arizona's Governor could not remove the commission's chairperson demonstrates how far the commission members are removed from political accountability.

C. How the commission reapportioned Arizona's state legislature.

As we note above, "Arizona has attempted to '*remove* redistricting from the political process ***.'" *Harris*, J.S. App. at 89a (Silver, J., concurring and dissenting) (quoting *Brewer*, 275 P.3d at 1273) (emphasis in original). To this end, Arizona's Constitution provides new legislative districts must be drawn in light of the traditional neutral criteria quoted above. Arizona's Constitution also specifies a specific procedure to map legislative districts in a non-partisan manner that prioritizes equal population.

1. The Grid Map

Arizona's Constitution requires the commission to begin reapportionment with a grid map and "districts of equal population in a grid-like pattern across the state." Ariz. Const. art. IV, pt. 2, § 1(14); J.S. App. at 150a. The commission created two alternative grid maps, one beginning in the center of the state and moving counterclockwise, and the other starting in the southeast corner of the state moving clockwise. *Harris*, J.S. App. at 19a. The commission voted to adopt the second of these grid maps starting in southeast Arizona. *Id.* The grid map and a table showing its deviation from the ideal of equal population is at J.A. Suppl. App. at SA25, SA50.

The commission selected the grid map with a population deviation of 4.07%.[8] J.S. App. 19a. The

8. Population deviation is the percentage by which districts deviate from the ideal of having population equally distributed among all election districts.

commission never explained why its grid map began with a population deviation of more than four percent instead of "districts of equal population" as Arizona's Constitution requires. Ariz. Const., art. IV, pt. 2 § 1 (14); J.S. App. at 150a; *Harris*, J.S. App. at 19a. But no matter the reason, the commission began with a grid map that was nearly double the two-and-one-half percent deviation of Arizona's legislative districts as reapportioned following the 2000 decennial census. *Ibid.*

2. The Draft Map

After the grid map is selected, the Arizona Constitution directs the commission to adjust the (supposedly equally-populated) grid map to comport with the Voting Rights Act and United States Constitution and to accommodate the neutral redistricting criteria of (1) equally-populated districts; (2) geographically compact and contiguous districts; (3) respecting communities of interest; (4) using visible geographic features and municipal boundaries; and, (5) creating competitive districts where making a district more competitive does not compromise other factors. Ariz. Const. art. IV, pt. 2, § 1(14)(F); *Harris*, J.S. App. at 24a. Arizona's Constitution does not recognize drawing legislative districts to provide a partisan advantage to one political party to be a legitimate redistricting criteria.

i. The commission's consultants told the commission to modify the grid map to create at least ten underpopulated "ability-to-elect" districts because they claimed doing so was necessary for the Justice Department to approve the scheme.

A redistricting scheme has an impermissible effect under section 5 of the Voting Rights Act if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (internal quotation omitted). Retrogression refers to a reduction in minority voting strength. Whether retrogression exists is determined by comparing "baseline" or "benchmark" districts (under the previous apportionment) with those created in a new redistricting scheme. Section 5 prohibits "only those redistricting plans that would have the purpose or effect of worsening the position of minority groups." *Shelby Cnty.*, 133 S. Ct. at 2626. "Section 5 was intended to halt actual retrogression in minority voting strength ***." *Riley* v. *Kennedy*, 553 U.S. 406, 432 (2008) (quoting *City of Lockhart* v. *United States*, 460 U.S. 125, 133 (1983)).

In its preclearance submission the commission told the Justice Department that there were seven baseline benchmark districts in Arizona's legislature. *Harris*, J.S. App. at 35a ("In its written submission, the Commission argued that the benchmark plan contained seven ability-to-elect districts, comprised of one Native American district and six Hispanic districts."). As such the commission could have satisfied the prohibition against retrogression by drawing a new map with seven minority ability-to-elect districts.

But, even though the commission told the Justice Department there were seven benchmark districts, the commission's advisors told the commissioners they needed to create at least ten minority ability-to-elect districts – three more than existed in the baseline plan. *Harris*, J.S. App. at 25a, 27a, 30a. The commission's consultant, Bruce Adelson, "informed the Commission at that time that he believed the 2002 map that was ultimately approved had nine districts in which minorities had an ability to elect their preferred candidates." *Id.* at 25a.

The commission was also told that winning Justice Department preclearance justified deviations from this Court's one-person, one-vote principle. "Adelson advised the Commission that underpopulating minority districts was an acceptable tool for complying with the Voting Rights Act, so long as the maximum deviation remained within ten percent." *Harris*, J.S. App. at 30a. The commission's legal counsel also told the commissioners "that some population disparity was permissible if it was a result of compliance with the Voting Rights Act."[9] *Id.* at 28a.

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9. The *per curiam* opinion explained, "[b]ecause the preclearance process focused on making sure there was no retrogression, that number [nine districts] was the benchmark, meaning that the new plan had to achieve at least the same number of ability-to-elect districts." *Harris*, J.A. App. at 25a. The *per curiam* opinion also explained that gaining Justice Department preclearance approval is a mystical undertaking without clear standards or goal-posts. "[S]tate officials do not know exactly what is required to achieve preclearance. *** [T]he Department of Justice relies on a variety of data in assessing retrogression, rather than assessing a fixed goal that states can easily ascertain." *Id.* at 22a. "[T]he preclearance process with respect to any particular plan is generally an opaque one." *Ibid.*

The commission's attorneys and consultants advised the commission to create at least ten ability-to-elect districts by underpopulating those districts. *Harris*, J.S. App. at 30a. The *per curiam* decision described this as an effort to "overshoot the mark." *Id.* at 23a.

Armed with this advice, the commission "used what it called the 'Cruz Index' to assess whether voters in an area might support a Hispanic candidate." *Harris*, J.S. App. at 26a. The "Cruz Index" was devised by two members of the commission and derived from "the 2010 election for Mine Inspector, a statewide race pitting Joe Hart, a Republican non-Hispanic white (or Anglo) candidate against Manuel Cruz, a Democrat, Hispanic candidate." *Ibid.* Using the "Cruz Index" the commission redrew Arizona's legislative districts – especially districts 24, 26 and 8. *Id.* at 31a-33a. "A consequence of these changes was an increase in population inequality." *Id.* at 32a. But, as the district court found, "In using the Cruz Index to adjust district boundaries *** the commissioners used a measure that *equally reflected the ability to elect a Democratic candidate.*" *Id.* at 37a (emphasis added).

By a three-to-two vote the commission decided to change the draft map, especially as to districts 24, 26 and 8. *Harris*, J.S. App. at 35a. These changes were proposed by Democrat Commissioner McNulty and opposed by the Republican members. *Ibid.* The effect of these changes was to increase the population deviation and also increase (albeit slightly) Hispanic population in districts 24, 26 and 8. *Id.* at 34a. But even after McNulty's changes, the Hispanic population in each of these districts was still below thirty-five percent. *Ibid.* And the Hispanic citizen-voting-age-population – the actual percentage of Hispanic

citizens eligible to cast a ballot – was even lower. *Id.* at 243a-44a.

The Republican members objected to these changes because they were done not to create Hispanic ability-to-elect districts but instead to achieve partisan benefit for the Democrat party. Republican "Commissioner Stertz argued the change favored Democrats in District 8 while 'hyperpacking' Republicans into District 11." *Harris*, J.S. App. at 32a. The *per curiam* decision agreed and found, "[t]he Republican commissioners were correct that the change would necessarily favor Democratic electoral prospects." *Ibid.* Commissioner McNulty "did not propose any corresponding effort to make any Democrat-leaning districts more competitive." *Ibid.*

ii. The district court found the commission's second motive for creating unequal legislative districts was to benefit the Democrat party.

The district court also found the commission had a second motive – to unequally apportion Arizona's legislature in order to gain a partisan advantage for the Democrat party. "Judge Clifton correctly finds that the IRC was actually motivated by both party advantage and hope for Voting Rights Act preclearance. So we have a majority for that finding of fact." *Harris*, J.S. App. at 107a (Wake, J., concurring and dissenting). Especially as to District 8, the *per curiam* decision found "the evidence clearly shows that partisanship played some role in its creation."[10] *Id.* at 78a.

10. Judge Silver likewise recognized "the *per curiam* opinion concludes partisanship did motivate certain changes." *Harris*, J.S. App. at 102a (Silver, J., concurring).

All three district court judges acknowledged partisanship was the reason (or, if not *the* reason, *a* reason) the commission redrew the draft map with these unequally-populated districts. Judge Silver acknowledged "Arizona has attempted to 'remove redistricting from the political process ***.'" *Harris*, J.S. App. at 89a (Silver, J., concurring and dissenting). But, Judge Silver found, "the very structure of Arizona's reformed redistricting process reflects that partisanship still plays a prominent role." *Ibid.* Judge Silver observed, "[t]he redistricting process, with all its adversarial tensions, has *always* been recognized as a profoundly partisan process." *Ibid.* (citing *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973)) (emphasis in original).

The *per curiam* opinion also agreed "[w]ith respect to deviations resulting from Commissioner McNulty's change to District 8 between the draft map and the final map, we find that partisanship clearly played some role." *Harris*, J.S. App. at 36a. Judges Clifton and Silver explained that "strengthening minority ability-to-elect districts were also changes that improved the prospects for electing Democratic candidates. Those motivations were not at cross purposes. They were entirely parallel. *** [And i]t is highly likely that the members of the Commission were aware of this correlation." *Id.* at 37a-38a. Thus, the *per curiam* decision concluded, "[i]f an individual member of the Commission were motivated to favor Democrats, that could have been accomplished under the guise of trying to strengthen minority ability-to-elect districts." *Id.* at 38a.

All three judges also concluded (or assumed) "partisanship is not a valid justification for departing from perfect population equality." *Harris*, J.S. App. at

62a. But Judges Clifton and Silver nonetheless upheld the commission's reapportionment because, while they:

> assume[d] that seeking partisan advantage is not a legitimate consideration [to justify population deviations,] *** the deviations in the ten districts submitted to the Department of Justice as minority ability-to-elect districts were predominantly a result of the Commission's good-faith efforts to achieve preclearance ***. Partisanship may have played some role, but the primary motivation was legitimate.

Id. at 36a.

3. The Final Map

The commission ultimately produced a final map. The final map is attached at J.A. Suppl. App. SA55-SA58, and a table summarizing the population deviations in each district is at J.A. Suppl. App. SA59-62.

The final map reapportioned Arizona's legislature with population deviation of almost nine percent. Nine districts were overpopulated by more than two-percent and nine districts were underpopulated by more than two-percent. *Harris*, J.S. App. at 112a (Wake, J., dissenting).[11] This is a population deviation *four times greater* than

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11. Districts 7, 4, 27, 3, 2, 24, 19, 30 and 8 were all underpopulated by more than two percent and these districts are all Democrat-leaning districts. Districts 14, 20, 18, 28, 5, 16, 25, 17 and 12 were all overpopulated by more than two percent and these were all Republican-leaning districts. *Harris*, J.S. App. at 112a-113a (Wake, J., dissenting).

the legislative districts drawn by the prior commission.[12] *Ibid.* And the commission demonstrated they could have reapportioned the legislative districts with essentially zero population deviation because this is how the commission reapportioned Arizona's congressional districts.[13]

Importantly, the total population deviation in the final map was *not* the result of accommodating *any* of the traditional redistricting criteria such as compactness, contiguity and existing geographic boundaries. These race-neutral and partisan-neutral criteria never even entered the district court's discussion of how and why the commission unequally reapportioned Arizona's legislature. And, the commission's final map unquestionably failed to satisfy Arizona's constitutional directive that legislative districts be equally populated.

In January 2012, the commission adopted the final map by a three-to-two vote. The Democrat members and Chairwoman Mathis voted in favor and the Republican members voted against the reapportionment scheme. In February 2012, the final legislative map was submitted to the Justice Department. In April, the Justice Department approved the map. Arizona's 2012 and 2014 state legislative elections have been conducted under the commission's reapportionment scheme. Unless this

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12. The 2000 legislative map had a population deviation of less than two and one-half percent. *Harris*, J.S. App. at 112a.

13. See IRC website, congressional district population data table, available at:
<http://azredistricting.org/Maps/Final-Maps/Congressional/Reports/Final%20Congressional%20Districts%20-%20Population%20Data%20Table.pdf> (last visited August 31, 2015).

Court acts, the commission's reapportionment scheme will govern Arizona's elections until after 2020.

4. The 2012 and 2014 elections confirm the intended partisan advantage for the Democrat party.

The 2012 election was conducted using the commission's final map. The results of the 2012 and 2014 elections demonstrate the intention to confer a benefit upon the Democrat party was realized. The *per curiam* opinion noted, "The practical correlation between these two motivations was confirmed by the results of the 2012 election ***. The legislators elected from districts identified by the Commission as minority ability-to-elect districts were all Democrats." *Harris*, J.S. App. 37a-38a; see also *id.* at 9a-10a. Similarly, the results of the 2014 election demonstrated the commission's desired effect, with Democrats winning twenty-nine out of thirty senate and house seats in the ten ability-to-elect districts.

D. The district court litigation.

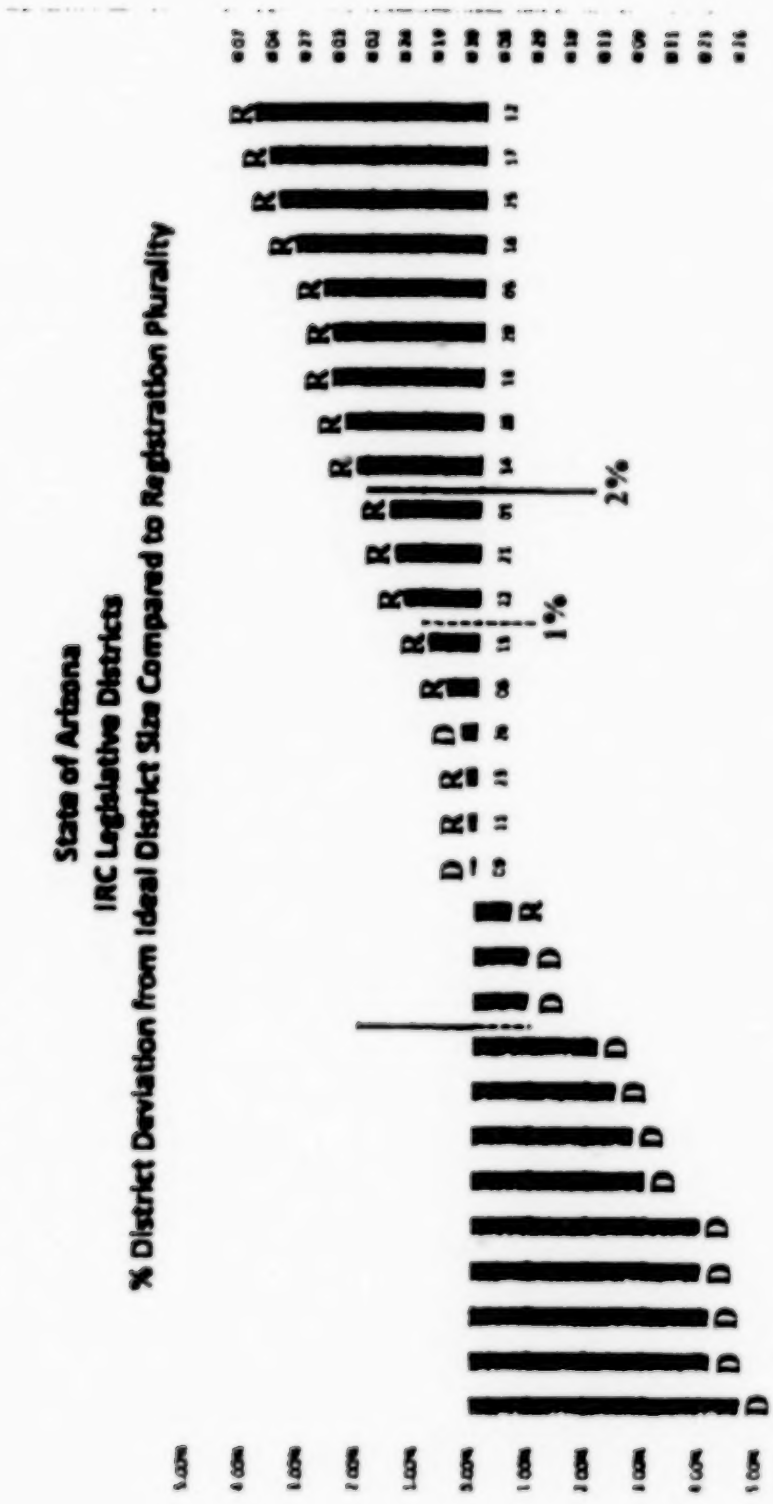
The Arizona citizens bringing this case reside in districts the commission over-populated. These Arizona citizens challenge the redistricting scheme because their votes were diluted. They seek redress through a declaration that the commission's final legislative map violated the Equal Protection Clause of the Fourteenth Amendment and the equal population requirement of Arizona's Constitution. *Harris*, J.S. App. at 7a.

In March 2013 the three-judge district court presided over a five-day trial. More than a year later, the court

issued a *per curiam* decision in which all three judges agreed partisanship was one of the reasons the commission unequally populated Arizona's legislative districts. Judge Clifton did not believe it was the *predominant* reason and Judge Silver did not believe it was the *only* reason for the population deviations. *Harris*, J.S. App. at 36a n.7, 63a n.10. The three judges also agreed (or agreed to assume for purposes of their decision) that achieving partisan advantage was not a legitimate reason to deviate from this Court's one-person, one-vote standard. *Id.* at 36a. "We assume that seeking partisan advantage is not a legitimate consideration." *Ibid.*

But Judges Clifton and Silver broke with Judge Wake to conclude "the Commission was predominantly motivated by a legitimate consideration [of] comply[ing] with the Voting Rights Act." *Harris*, J.S. App. at 38a. And, because of the purported desire to obtain preclearance approval from the Justice Department, Judges Clifton and Silver affirmed the commission's unequal apportionment of Arizona's legislature.

Judge Wake dissented from this part of the *per curiam* decision to find that the commission's final map systematically and intentionally underpopulated Democrat districts and overpopulated Republican districts for the purpose of gaining partisan advantage for the Democrat party. *Harris*, J.S. App. at 107a-108a. Judge Wake demonstrated this point with two exhibits:


State of Arizona
IRC Legislative Districts
% District Deviation from Ideal District Size Compared to Registration Plurality
2%
1%

			#	%
Democratic registration plurality	7	203,026	-10,041	-4.7
	4	204,143	-8924	-4.2
	27	204,195	-8872	-4.2
	3	204,613	-8454	-4.0
	2	204,615	-8452	-4.0
	24	206,659	-6408	-3.0
	19	207,088	-5979	-2.8
	30	207,763	-5304	-2.5
	8	208,422	-4645	-2.2
Republican registration plurality	14	217,693	+4625	+2.2
	20	218,167	+5099	+2.4
	18	218,677	+5609	+2.6
	28	218,713	+5645	+2.6
	5	219,040	+5972	+2.8
	16	220,157	+7089	+3.3
	25	220,795	+7727	+3.6
	17	221,174	+8106	+3.8
	12	221,735	+8667	+4.1

Harris, J.S. App. at 112a-113a. Judges Clifton and Silver did not disagree with this factual point.

Judge Wake found the commission's reapportionment scheme violated the Equal Protection Clause because gaining a partisan advantage for one political party is not a legitimate or rational state policy that justifies deviating from the one-person, one-vote ideal. *Harris*, J.S. App. at 116a-117a. He further found the commission's purported

desire to obtain preclearance approval by creating (or attempting to create) three additional minority ability-to-elect districts did not justify a reapportionment scheme with systematic population inequality. Judge Wake reached this conclusion because (a) the Voting Rights Act does not allow the Justice Department to require unequally-populated legislative districts; and (b) even if the Voting Rights Act did allow the Justice Department to require the commission to unequally apportion Arizona's legislative districts, this Court's decision in *Shelby County* eliminated that justification. *Id.* at 136a-37a, 144a-145a.

SUMMARY OF ARGUMENT

The commission's reapportionment of Arizona's legislature violates the one-person, one-vote principle of the Equal Protection Clause. The district court found only two reasons for the commission's nearly nine-percent deviation from the one-person, one-vote ideal.

The first reason was the desire (held by three of the five commissioners) to provide partisan benefit to the Democrat party by deliberately and systematically underpopulating Democrat districts, thereby inflating the weight of these Arizona citizens' votes, and overpopulating or packing Republican districts, and thereby diluting the weight of those Arizona citizens' votes.[14] The second reason was because the commission's lawyers said the commission must create at least ten minority "ability-to-elect" districts to gain Justice Department preclearance approval.

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14. The total population of the underpopulated districts is 2,484,365, and the total population of the overpopulated districts is 3,907,652. See *Harris*, Suppl. J.A. at SA59.

Neither of these reasons justifies deviating from this Court's one-person, one-vote principle, nor is either reason consistent with Arizona's stated policy of equally populating legislative districts and limiting the influence of partisanship in redistricting.[15]

ARGUMENT

I. Partisan advantage does not justify deviating from the one-person, one-vote Equal Protection standard.

The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing – one person, one vote.

Gray,
372 U.S. at 381.

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15. To be clear, this is a one-person, one-vote Equal Protection challenge. This is *not* a partisan gerrymandering claim and we do not claim reapportionment must be free of partisan interest. We acknowledge reapportionment is inextricably intertwined with partisan interests. But the Equal Protection Clause and this Court's post-*Reynolds* jurisprudence establishes the supervening constitutional principle of one-person, one-vote.

A. The Equal Protection Clause requires districts of as nearly equal population as practicable.

*Each state is required to "make an honest and good faith effort to construct districts *** as nearly of equal population as is practicable."*

Reynolds, 377 U.S. at 577.

The United States Constitution requires state legislative districts to be equally apportioned to assure the constitutionally-guaranteed right of suffrage is not denied by debasement or dilution. See *id.*; *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964).

This case asks, in the first instance, whether it is permissible for a redistricting commission to deviate from this Court's one-person, one-vote standard to confer a partisan benefit upon one political party to the detriment of another political party.

The district court noted that "[t]he Supreme Court has not decided whether or not political gain at a legitimate state redistricting tool." *Harris*, J.S. App. 62a (citing *Cox* v. *Larios*, 542 U.S. 947, 951 (2004) (Scalia, J., dissenting from summary affirmance)); see also *Id.* at 117a ("The Supreme Court has not decided whether partisan advantage itself is a permissible reason for population inequality, that is, whether it carries any weight or no weight against equality in the analysis.") (Wake, J., dissenting).[16]

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16. Though she assumed partisan advantage was not a legitimate justification, Judge Silver intimated partisan advantage may be an acceptable justification to deviate from the one-person,

The district court assumed that unequally apportioning Arizona's legislature to gain a partisan advantage for the Democrat party was not a legitimate reason to deviate from this Court's one-person, one-vote standard. *Harris*, J.S. App. at 36a.

The district court was right to make this assumption. This Court has never held obtaining a partisan advantage for one political party justifies unequally apportioning a state's legislative districts.

This Court established the ideal in *Baker* v. *Carr*, 369 U.S. 186 (1962), and *Gray* v. *Sanders*, 372 U.S. at 379-80:

> [A]ll who participate in the election are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographic unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that

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one-vote ideal. See *Harris*, J.S. App. at 88a-93a. Judge Silver derived her inference from *Easley* v. *Cromartie*, 532 U.S. 234, 248 (2001), where districts were drawn to protect an incumbent. But Judge Silver failed to appreciate that states have a justifiable *non-partisan* reason to protect incumbents. Incumbents, by virtue of their tenure in office, have seniority in Congress or in the state legislature. Preserving a member of Congress who is, for example, the chairman of the Ways and Means Committee is a legitimate interest beneficial to the state as a whole not just a benefit to the member's specific political party.

> every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

In its following term, the Court addressed the "basic standards and stat[ed] the applicable guidelines for implementing [this Court's] decision in *Baker*." *Reynolds*, 377 U.S. at 559. And, citing *Wesberry*, 376 U.S. at 7, this Court held an apportionment which "'contracts the value of some votes and expands that of others' is unconstitutional." See also *Reynolds*, 377 U.S. at 559 (following and affirming *Baker* and *Wesberry*).[17]

In *Reynolds*, this Court held, "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." 377 U.S. at 568. This Court further advised, "careful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of

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17. Judge Kozinski summarized this point in *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 782 (9th Cir. 1990) ("The principle of electoral equality assures that, regardless of the size of the whole body of constituents, political power, as defined by those eligible to vote, is equalized as between districts holding the same number of representatives. It also assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location.") (Kozinski, J., concurring and dissenting).

deviations from a strict population basis." *Id.* at 581. To that end, "the overriding objective must be substantial equality of population among the various districts so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579.

To be sure, precise mathematical equality is not required. This Court acknowledges, "[a] State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme." *Reynolds*, 377 U.S. at 578; see also *Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983) (discussing legitimate state policies that may justify slight and incidental population deviations in congressional redistricting).

But this Court purposefully cabined these deviations by holding:

> [s]o long as the divergences from a strict population standard are *based on legitimate considerations incident to the effectuation of a rational state policy,* some deviations from the equal-population principle are constitutionally permissible ***. But neither history alone, nor economic *or other sorts of group interests*, are permissible factors in attempting to justify disparities from population–based representation.
>
> *Reynolds*, 377 U.S. at 579-80.[18]

18. Emphasis added.

The partisan interests the commission sought to advance in Arizona are inimical to the one-person, one-vote standard and where the Court can ferret them out and eliminate them by a judicially manageable standard – the one-person, one-vote standard – it should. See *Harris*, J.S. App. at 120a (Wake, J., dissenting) ("The low-hanging fruit is within the reach of the Equal Protection Clause even if the rest is not. Constitutional doctrine must mark out systematic population inequality, proven by statistics, as unreasonable, discriminatory, and actionable, provided no other legal reason saves it.").

B. The commission's systematic dilution and overweighing of Arizona citizens' votes violates the one-person, one-vote standard because it was driven by the desire to benefit one political party.

[The] Commission has been coin-clipping the currency of our democracy – everyone's equal vote – and giving all the shavings to one party, for no valid reason.

Harris, J.S. App. at 109a (Wake, J. dissenting).

Captain Renault (played by Claude Rains), the Vichy France policeman in *Casablanca*, famously protested to Rick Blaine (played by Humphrey Bogart), "I'm shocked, shocked, to find that gambling is going on in here!"[19] Partisanship in redistricting is like gambling in a casino. Of course partisanship is present. Politics is part of the

19. *Casablanca* (1942).

warp and woof of redistricting. We are not naive to this reality nor do we ask this Court to be. Judge Silver noted, "the very structure of Arizona's reformed redistricting process reflects that partisanship still plays a prominent role." *Harris*, J.S. App. at 89a.

And all three judges agreed the commission's systematic dilution of the weight of votes by some voters while overweighing the votes of other voters arose from a desire to achieve a partisan advantage for the Democrat party. This was especially so for Districts 24, 26 and 8. See p. 12, *supra*. The only issue that divided the three judges was whether obtaining a partisan advantage was the "*predominant*" motive (Judge Clifton) or the "*actual and sole*" motive (Judge Silver). *Harris*, J.S. App. at 63a n.10, 94a.[20]

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20. A majority of this Court recently held an "independent" redistricting commission, in an effort to reduce partisan influence in redistricting, could draw Arizona's congressional districts with a zero-deviation reapportionment. This Court held the Elections Clause did not prohibit the commission from drawing equally-populated congressional districts. *Ariz. State Legislature*, 135 S. Ct. at 2677. This Court said this holding was consistent with a "core principle of republican government" that "voters should choose their representatives, not the other way around." *Id.* (citation omitted).

Arizona State Legislature did not address a redistricting scheme (such as here) that systematically underpopulated Democrat districts and correspondingly overpopulated Republican districts. As Judge Wake demonstrated, we do not need to infer a partisan motive for the commission's reapportionment of Arizona's legislature, the partisanship is statistically explicit. See *Harris*, J.S. App. at 120 ("This is about systematic population inequality for party advantage that is not only provable but entirely obvious as a matter of statistics alone."); see also pp. 19-20, *supra*.

Our point is simply this: The commission drew unequal districts to create partisan advantage for the Democrat party. It does not really matter that it was the Democrat Party that benefitted. It could have been the Republican Party. Our argument does not turn upon which party gains the advantage. This challenge is not about "group rights" of registered Republicans versus registered Democrats. This case concerns the right of *all* Arizona citizens to have their votes equally weighed as the United States and Arizona Constitutions guarantee.

The Equal Protection Clause protects individuals. The district court litigation was brought by individual Arizona voters to protect their right—and the rights of thousands of other Arizona citizens—to have their votes equally weighted when electing their state representatives.

C. Gaining partisan advantage for one political party is not a legitimate reason to deviate from this Court's one-person, one-vote principle.

[A]ll voters, as citizens of a State, stand in the same relation ***. *** Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race or economic status.*

Reynolds,
377 U.S. at 565-66.[21]

i. Partisanship does not justify violating the rights individual voters are guaranteed by the Equal Protection Clause principle of one-person, one-vote.

The *presence* of partisanship in reapportionment is not our complaint. Rather, our argument is that partisanship does not justify *unequally weighing* the votes of individual Arizona voters in violation of the one-person, one-vote principle.

Judge Silver noted, "[the Democrats on the Commission] had a much easier path available to them than engaging in the complicated task of [creating] minor population deviations: *the Commission could have set up districts of equal population* but drawn the district boundaries differently. *** [t]hat would have resulted in far greater partisan impact and the approach would

21. Internal citation omitted.

have had the added benefit of being almost impossible to challenge." *Harris*, J.S. App. at 99a (citation omitted, emphasis added).

To which we say: precisely. That is what the commission should have done – "set up districts of equal population." Had the commission done so (even if the commission did so to gain a partisan advantage) it is not likely we would be here.[22] But the commission did *not* equally apportion Arizona's legislative districts. Rather, the Commission intentionally *deviated* from this Court's one-person, one-vote ideal (by unequally weighing the votes of nearly two million Arizona voters) to confer partisan advantage upon the Democrat party.

As the district court noted below, this Court has *never* held that conferring a partisan advantage on one political party is a legitimate justification to violate the rights of individual voters to have their vote equally weighed. To the contrary:

> [This] Court has never suggested that certain geographic areas *or political interests* are entitled to disproportionate representation. Rather, our statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes

22. Of course, beyond the Equal Protection Clause, Arizona's Constitution also sought to reduce the extent to which partisan interest influenced reapportionment by requiring the commission to draw Arizona's legislative districts in light of traditional non-partisan criteria. The commission still needs to comply with these criteria even if they endeavored to draw equally-populated districts to accomplish a partisan end.

> justify departures from strict equality. Accordingly, *we have underscored the danger of apportionment structures that contain built-in bias tending to favor particular geographic areas or political interests* ***.
>
> *Abate* v. *Mundt*, 403 U.S. 182, 185-86 (1971).[23]

Of course, "minor deviations" in population may be acceptable when necessary to achieve some legitimate and rational state policy. But even then the state must "show with some specificity that a particular objective required the specific population deviations in its plan, rather than simply relying on general assertions." *Karcher*, 462 U.S. at 741.[24]

The Commission's plan fails on both points. First, conferring a partisan benefit upon the Democrat party was not a legitimate Arizona state policy. Indeed, all three judges concluded (or assumed) it was not. Further, the motivating animus for the citizen initiative that created the commission (Proposition 106) was the desire to *remove* partisanship from Arizona's redistricting process. The express and explicit objective of Proposition 106 was to reduce and restrain the degree that one party's political advantage shaped the redistricting of Arizona's legislature. See pp. 4-5, *supra*.

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23. Emphasis added and citation omitted.

24. *Karcher* is a congressional redistricting case but, once the challengers have (as here) shown the malapportioned districts were the result of illegitimate justifications, the burden shifts to the reapportioning body to justify the deviation. See pp. 49-51, *infra*.

Second, the commission offered no explanation why inflating the electoral weight of voters in Democrat districts and diluting the electoral weight of voters in Republican districts was required by *any* of the neutral objectives listed in the Arizona Constitution. To be sure, the Commission claimed it unequally populated Arizona's legislative districts to win Justice Department preclearance approval. But, as we explain below, this purported justification is invalid.

Justices Stevens and Breyer separately concurred in *Cox* supporting this Court's decision to affirm a district court striking down Georgia's redistricting plan because the reapportionment plan was "an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another." *Cox* v. *Larios*, 542 U.S. 947, 947 (2004) (citing and quoting *Larios* v. *Cox*, 300 F. Supp.2d 1320, 1329 (N.D. Ga. 2004)).[25] Justice Stevens

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25. Several members of this Court have expressed long-standing skepticism about the role partisan interest plays in redistricting. See, *e.g.*, *Davis* v. *Bandemer*, 478 U.S. 109, 166 (1986) (gerrymandering "violates the Equal Protection Clause only when the redistricting plan serves 'no purpose other than to favor one segment – whether racial, ethnic, religious, economic, or political – that may occupy a position of strength at a particular time, or to disadvantage a politically weak segment of the community'") (citing *Karcher*, 462 U.S. at 748) (Powell, J., concurring in part and dissenting in part). In *Vieth* v. *Jubelirer*, 541 U.S. 267, 318 (2004), Justice Stevens explained in dissent that "when partisanship is the legislature's sole motivation – when any pretense of neutrality

went on to say, "I remain convinced that in time the present 'failure of judicial will,' will be replaced by stern condemnation of partisan gerrymandering that does not even pretend to be justified by neutral principles." *Id.* at 951. That same concern is even more compelling when the reapportionment scheme, as here, violates this Court's one-person, one-vote principle.

ii. The commission's unequally-populated legislative districts violate Arizona's constitutional requirement that the legislature be of equally-populated districts.

In addition to the Equal Protection Clause, the Arizona Constitution requires the Commission to equally populate its legislative districts.[26] See Ariz. Const. art.

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is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage – the governing body cannot be said to have acted impartially." See also *Vieth* v. *Jubelirer*, No. 02-1580, opinion announcement transcript, April 28, 2004 (Stevens, J., dissenting) ("neither Justice Scalia's plurality opinion, nor Justice Kennedy's opinion concurring in the judgment, contains a single kind word about political gerrymandering. Partisan gerrymandering like the English rotten borough enables representatives to choose their constituents rather than vice versa. It is an invidious, undemocratic and unconstitutional practice.") (available at: <http://www.oyez.org/cases/2000-2009/2003/2003_02_1580> (last visited Aug. 25, 2015)). And Justice Breyer in *Vieth* asked whether it is not the task of this Court to "police the outer fringe." *Vieth*, oral argument transcript (Dec. 10, 2003).

26. The district court did not reach the Arizona state law challenge to the commission's redistricting scheme. But Arizona's constitutional criteria are directly relevant to the Equal Protection challenge. This is so because the commission's deviation from the one-person, one-vote ideal must be justified by a legitimate and

IV, pt. 2, § 1(14)(A). The commission's failure to follow this admonition is undisputed and, in fact, the commission intentionally created significant population deviation in Arizona's legislative districts. No one disputes the math. Sixty percent of Arizona's state legislative districts are unequally populated, and the votes of nearly two million Arizona citizens are diluted or inflated under the commission's reapportionment scheme. *Harris*, J.S. App. at 109a (Wake, J., dissenting).

It is not just that the commission unequally populated the Arizona legislative districts *absent any* Arizona state policy that it do so. Rather it is that the commission did this *contrary to Arizona's express policy* that legislative districts be equally populated. The commission committed a sin of commission not omission. The commission's cardinal sin was to affirmatively, deliberately and intentionally violate Arizona's constitutional directive that legislative districts be equally populated.

The commission began with an unequal grid map with a more than four-percent deviation from the equal-population ideal, then the Commission deliberately redrew the grid map, and subsequent draft maps, to create *even greater inequality* of almost nine percent. Under the commission's direction, the Arizona legislature moved from a two and one-half percent deviation in the 2000 reapportionment, to a more than four-percent deviation in the grid map, to an almost nine-percent deviation in the commission's final map.

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rational state policy. Thus, it is necessary to ask, what state policy has Arizona adopted to guide the commission in its redistricting task? Arizona explicitly delineated these policies in its constitution.

Relying upon the advice of its advisors that the commission could draw malapportioned districts up to a ten-percent deviation, the commission crafted its scheme with deviations just shy of that mark. As the *per curiam* decision noted, the commission believed it could malapportion Arizona's legislature as long as it avoided transgressing the ten-percent deviation that would be a *prima facie* presumption of unconstitutionality.[27] *Harris*, J.S. App. at 30a.

II. Obtaining Justice Department preclearance is not a legitimate reason to deviate from the one-person, one-vote standard.

Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

Shelby Cnty.,
133 S. Ct. at 2631.

Judge Wake found the commission's reapportionment scheme violated the Equal Protection Clause. We turn now to the *only reason* the other two district court judges found the commission's unequally-populated districts to be legitimate.

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27. See p. 11, *supra*; see also Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. Pa. J. of Const. Law 1001, 1063 (2005) ("If a plan's population deviation is very close to ten percent, this is itself evidence of some kind of bad faith, in that there was no real effort to achieve perfect equality, and the only goal was to avoid the *prima facie* unconstitutionality that would result from a deviation of more than ten percent.").

The only reason Judges Clifton and Silver upheld the commission's plan was because the commission's lawyers and consultants told the commission the Justice Department would not preclear the commission's plan unless it created ten minority ability-to-elect districts. To create these districts, the commission had to underpopulate these districts, and in so doing, inflate and dilute the weight of nearly two million Arizona voters' votes. See J.S. Suppl. App. at SA59; J.S. App. at 109a.

So, the question is, does a purported desire to obtain Justice Department preclearance under the Voting Rights Act justify unequally apportioning Arizona's legislature? This question is made even easier to answer because this Court's decision in *Shelby County* held the formula subjecting Arizona to section 5 preclearance to be unconstitutional. But first some background.

In the 1960s, six southern states formerly part of the Confederacy continued to discriminate against African-Americans by adopting election laws imposing devices and procedures such as poll taxes intended to deny black citizens the right to vote or conducting elections in a manner that diluted and diminished the weight of votes cast by black citizens. Congress found this discrimination to be an "evil" justifying "extraordinary measures," and adopted the Voting Rights Act in 1965 to address this extraordinary evil.

The Voting Rights Act departed from traditional principles of federalism and state sovereignty to suborn the election laws of the six affected states to supervening federal review and approval. Among these provisions

was the section 5 requirement that covered jurisdictions submit any change in their election laws to the Justice Department or to a three-judge panel in Washington D.C. before implementing the change. Reapportioning a state's legislature was an election law change covered by the preclearance requirement.

The Voting Rights Act was originally enacted for five years. The Act was subsequently renewed for successive periods, most recently in 2006. But despite these reenactments, the formula defining which states (or sub-jurisdictions) are covered by the preclearance requirement had not changed since 1975. Under the 1975 formula, Arizona and Alaska became subject to the preclearance requirements.

Originally "'covered' jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election." *Shelby Cnty.*, 133 S. Ct. at 2619. These original states included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. *Id.* at 2620. Arizona was not a covered jurisdiction.

In 1912, Arizona adopted an English-language literacy test as part of voter registration.[28] Arizona

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28. James T. Tucker, *et al.*, *Voting Rights in Arizona: 1982-2006*, 17 Rev. of Law & Soc. Justice 283, 285-86 (2008). Arizona Statute § 16-101 formerly provided:

> [a voter must be] able to read the Constitution of the United States in the English language in a manner showing that he is neither prompted nor reciting

repealed its English-language literacy test in 1972 and adopted bilingual ballots in 1974.[29]

Notwithstanding Arizona's repeal of literacy tests and Arizona's adoption of bilingual ballots, Arizona became a covered jurisdiction in September 1975 when Congress reauthorized the Voting Rights Act and amended its "definition of 'test or device' to include the practice of providing English-only voting materials in places where over five-percent of voting-age citizens spoke a single

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> from memory, unless prevented from so doing by physical disability. *** Is able to write his name, unless prevented from so doing by physical disability.

Apache Cnty. v. *United States*, 256 F. Supp. 903, 905 n.2 (D.D.C. 1966).

29. Brief of Arizona, Georgia, South Carolina, and South Dakota as *Amici Curiae* in Support of Petitioner, *Shelby County*, 2013 WL 50688, at *8 (filed Jan. 2, 2013) (citing *Hearing Before the S. Subcomm. on Constitutional Rights*, Committee on the Judiciary, 94th Cong. (Apr. 30, 1975) (testimony of Sen. Barry Goldwater explaining that Arizona did not use English-only ballots in 1974 or after)), stating:

> Because the Act references specific years, some States, such as Delaware, remain uncovered even though they used a test or device prohibited by Section 4(c) in both 1964 and 1968....Because voter registration fell below fifty percent after 1972 rather than during that year, Delaware need not seek preclearance for its laws. In contrast, Arizona was not using a test or device in 1975, when Congress amended the Act to add language minorities to the coverage formula.

See also Alia Beard Rau, *Supreme Court Nullifies Key Part of Voting Rights Act*, Ariz. Republic, June 25, 2013 ("Arizona adopted bilingual ballots in 1974.").

language other than English." *Shelby Cnty.*, 133 S. Ct. at 2620 (citing VRA Amendments of 1975 §§ 101, 102, 103; 28 C.F.R. pt. 51, App.) (citations omitted). Arizona became subject to the "extraordinary measure" of section 5 preclearance because of conditions that existed more than a generation ago.

In *Shelby County,* this Court found the section 4(b) coverage formula irrational and unconstitutional because it was based upon a state of affairs that had no relation to current conditions. It struck down the formula as it applied to nine states, including Arizona. The dissenting Justices noted, "The Court stops any application of section 5 by holding that § 4(b)'s coverage formula is unconstitutional." 133 S. Ct. at 2648 (Ginsburg, J. dissenting).

The formula in section 4(b) no longer applies to Arizona, and would be irrational if it did. Arizona repealed the English-language test in 1972, Arizona has provided bilingual ballots since 1974 and more than fifty percent of Arizona's voting age population is registered to vote.[30] More than fifty percent of Arizona citizens of voting age voted in the past two presidential elections.[31] Treating

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30. Statistical Abstract of the United States, Table 400 (2012), available at: <http://www.census.gov/compendia/statab/2012/tables/12s0400.pdf> (last visited August 25, 2015).

31. Arizona Secretary of State, State of Arizona Official Canvass, 2012 and 2008 general elections, available at: <http://apps.azsos.gov/election/2012/General/Canvass2012GE.pdf> (last visited August 25, 2012) (showing 2,323,579 ballots cast in the 2012 presidential election), and: <http://apps.azsos.gov/election/2008/General/Canvass2008GE.pdf> (last visited August 25, 2012) (showing 2,320,851 ballots cast in the 2008 presidential election); see also U.S. Census Bureau

Arizona as if its election practices were frozen in amber during the Nixon Administration is irrational. But the commission's purported attempt to comply with this irrational, and now unconstitutional, provision was the purported justification for deliberately and intentionally apportioning Arizona's legislative districts unequally.

A. The Voting Rights Act does not require districts of unequal population

We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues.

Miller v. *Johnson*,
515 U.S. 900, 922 (1995).

The commission told the Justice Department its baseline benchmark map (the legislative apportionment from 2000) "contained seven ability-to-elect districts, comprised of one Native American district and six Hispanic districts." *Harris*, J.S. App. at 35a. To avoid retrogression and obtain preclearance, the commission needed to only adopt a map that did not reduce this number of minority ability-to-elect districts.[32]

Voting Age Population by Citizenship and Race, available at: <https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html> (last visited August 25, 2012) (showing 4,285,735 CVAP for Arizona between 2008 and 2012).

32. As Judge Wake notes even retrogression was not prohibited depending upon circumstances. *Harris*, J.S. App. at 124a, 135a (Wake, J. dissenting).

But, as the *per curiam* decision described it, the commission "overshot the mark" and tried to create ten minority ability-to-elect districts and an eleventh district (District 8) the commission could argue was a minority "opportunity-to-elect" district. All of these districts are underpopulated and to create these districts the commission had to dilute the weight of votes by citizens in Republican districts. Most importantly, neither the Justice Department nor the Voting Rights Act (even before *Shelby County*), required the commission to malapportion Arizona's legislature to create three additional Hispanic minority-majority or opportunity-to-elect districts in order to obtain preclearance.

As this Court explained in *Miller*, 515 U.S. at 922, "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis."

Judge Wake explained why, even before *Shelby County*, the desire for Justice Department preclearance does not justify unequally apportioning Arizona's legislative districts. Judge Wake rightly noted that no authority holds "systematic population inequality is a reasonable means of pursuing Voting Rights Act preclearance." *Harris*, J.S. App. at 107a (Wake, J., dissenting). Judge Wake supported his premise by noting:

(1) Arizona's redistricting policy commands the Commission to create equally-populated districts, not unequally-populated districts and, thus, Arizona state policy does not support creation of unequally-populated districts;

(2) The Voting Rights Act does not "require or authorize population inequality in legislative districting, directly or by implication." *Harris*, J.S. App. at 131a. To the contrary, "Section 5 non-retrogression and preclearance yield to population equality." *Ibid.* Indeed, this Court has explained, "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the [Voting Rights] Act, ***** into tension with the Fourteenth Amendment." *Miller*, 515 U.S. at 927 (citation omitted);

(3) "[T]he Department of Justice has never required unequal population for preclearance in the 48 years of administering Section 5." *Harris*, J.S. App. at 132a (Wake, J., dissenting). And, if it did, the Constitution does not "grant Congress power to enact legislation requiring or permitting population inequality among voting districts." *Id.*; see also *Reynolds*, 377 U.S. at 555 n.29 (the right to vote "includes the right to have the vote counted at full value without dilution or discount");

(4) The Justice Department's own guidance manual states "[p]reventing retrogression under Section 5 does *not* require jurisdictions to violate the one-person, one-vote principle." *Harris*, J.S. App. at 134a-135a (quoting Justice Department *Guidance Concerning Redistricting under Section 5*, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011)) (emphasis added); and

(5) While a redistricting authority may "seek a margin of safety or go entirely beyond the Voting Rights Act" in the creation of additional minority ability-to-elect districts, "[n]o matter how many or few majority-minority, minority-influence, or cross-over districts a jurisdiction

tries to create, systematic population inequality is an illegal means to get there." *Harris*, J.S. App. at 136a-137a.

Judge Wake notes the commission's defense of its "systematic malapportionment" is that the federal Voting Rights Act *compelled* its unequally-populated legislative districts. *Harris*, J.S. App. at 137a-138a. This proposition (the Voting Rights Act made the commission dilute the weight of some citizens' votes and inflate the weight of other citizens' votes) is entirely at odds with the purpose for which the Voting Rights Act was adopted. And, more importantly, this notion of "having to" dilute some citizens' votes and inflate other citizens' votes is flatly contrary to the Constitution's guarantee of equal protection. A statute cannot command a constitutional violation. See *Marbury* v. *Madison*, 5 U.S. 137, 176-77 (1803).[33]

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33. In *Marbury*, this Court stated:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. *** It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

The commission cannot justify its scheme on the basis that it relied upon defective legal advice.[34] The commission unequally populated Arizona's legislative districts. This point is not disputed. And the commission's proffered explanation of wanting to create ten or eleven minority ability-to-elect districts makes no sense. The commission's purported Hispanic ability-to-elect districts included at least three districts where the Hispanic population was less than thirty-five percent, and far lower than that when Hispanic citizen-voting-age population is considered. *Harris*, J.S. App. at 243a-44a. The commission did not explain how these districts were (a) necessary to achieve preclearance; nor, (b) necessary to elect a Hispanic representative – even assuming all Hispanics citizens voted as a block.

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34. See *Harris*, J.S. App. at 76a, 140a-141a (*per curiam* opinion and Wake dissent in agreement). The defective advice Adelson provided the commission is a further reflection of how partisanship tainted the commission's redistricting process. Rather than obtain objective or bi-partisan advisors, the Democrat-inclined Chairwoman and Democrat commissioners hired advisors with a Democrat party background and bias and prevented the Republican members from obtaining an attorney of their choice. See p. 7, *supra*.

B. Even if the Justice Department could require Arizona to unequally populate its legislative districts, *Shelby County* eliminated that justification.

> *The Voting Rights Act is far from ordinary.* *** *the Act was "uncommon" and was "not otherwise appropriate," but was justified by "exceptional" and "unique" conditions.*
>
> *Shelby Cnty.*,
> 133 S. Ct. at 2630.[35]

The commission's unequal legislative districts will govern how Arizona citizens elect their state legislators until the next decade. Judges Clifton and Silver held these unequally populated districts are nonetheless constitutional because the commission drew the maps before *Shelby County*. This is like saying a "separate but equal" school segregation scheme is constitutional because the school was segregated when "separate but equal" schools were legitimate under *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), notwithstanding this Court's subsequent decision in *Brown* v. *Bd. of Education*, 347 U.S. 483 (1954).

While the commission drew Arizona's legislative map before *Shelby County*, the district court decided this case *after Shelby County*. The district court was bound to follow and apply this Court's holding in *Shelby County*. A court must decide a case consistent with current law.[36]

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35. Citing *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334-35 (1966), abrogated by *Shelby County*.

36. See *Bradley* v. *Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974) ("[A] court is to apply a law in effect at the time it renders

Decisions invalidating unconstitutional laws apply to prior government acts, even when those acts were legal under then-existing law. See *Harper* v. *Va. Dept. of Taxation*, 509 U.S. 86, 97 (1993); *Davis* v. *Mich. Dept. of Treasury*, 489 U.S. 803, 817 (1989).

The district court should have remanded the redistricting scheme with instructions to redraw the map in light of this Court's decision in *Shelby County*. Judge Wake explained that the commission "can shave their boundaries into equality for nothing compared to the years and millions they are spending to resist doing so." *Harris*, J.S. App. at 126a-127a (Wake, J., dissenting). But Judges Clifton and Silver did not agree. Instead, the *per curiam* decision defended the commission's systematic dilution of individual's votes on the basis of a pre-*Shelby County* state of affairs.

Judge Wake explained why Judges Clifton and Silver were wrong. "To allow the current map to govern successive election cycles until 2020 would give continuing force to Section 5 despite the unconstitutionality of applying it anywhere."[37] *Harris*, J.S. App. at 125a (Wake, J., dissenting).

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its decision had been made to prevent manifest injustice") (internal quotation and citation omitted); *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 534 (1991) ("In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar."); *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 (1801) ("[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.").

37. Other district courts have followed this principle. See, *e.g.*, *Hall* v. *Louisiana*, 973 F. Supp.2d 675, 683 (M.D. La. 2013) ("In

C. This case is not about whether the commission acted "in good faith" but whether Arizona's legislative districts satisfy the one-person, one-vote principle.

[C]ongressional approval, however well-considered, could hardly validate an unconstitutional state legislative apportionment. Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights.

Reynolds,
377 U.S. at 582 (1964).

The object of this litigation is to determine whether nearly two million Arizona citizens residing in sixty percent of Arizona's legislative districts have realized the Equal Protection Clause's one-person, one-vote guarantee and whether the one-person, one-vote principle will govern the election of Arizona's legislature until 2020.

Judges Clifton and Silver erred when they believed an admittedly unequal reapportionment scheme could be otherwise validated because, when the scheme was adopted, the commission acted in a "good faith" belief this was necessary to obtain Justice Department preclearance. We know of no authority for such a proposition. Indeed,

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sum, because the Supreme Court did not state a contrary intention in *Shelby County*, the general rule that a rule of law set out by the Court must be given retroactive effect in cases that are still under direct review applies."); *Bird* v. *Sumter Cnty. Bd. of Educ.*, 2013 WL 5797653, at *3 (M.D. Ga. Oct. 28, 2013) ("Nothing in the *Shelby County* decision precludes the retroactive effect typically afforded judicial decisions.") (citations omitted).

this Court has held precisely the opposite. "It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the [Voting Rights] Act." *Miller*, 515 U.S. at 921.

When this Court has upheld the reapportionment of state legislative districts with population deviations, it has done so only when the deviations are minor and necessary to accomplish some legitimate rational state policy that is neither arbitrary nor discriminatory. See Part I(c)(i), *supra*. The "bad faith" or "good faith" of the mapdrawer is not the question. The issue before this Court is whether the ultimate reapportionment scheme the commission adopted comports with the Equal Protection Clause guarantee of one-person, one-vote and, if not, whether there is a legitimate reason for the deviation. The commission's unequal reapportion does not comply with the guaranteed one-person, one-vote principle and the commission had no legitimate reason to unequally populate Arizona's legislative districts.

III. There is no ten-percent "safe harbor" allowing deviation from the one-person, one-vote requirement.

[A]ppellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation.

Cox,
542 U.S. at 949.[38]

A. The ten-percent deviation concept is a burden-shifting rule, not a safe harbor.

The commission and its advisors wrongly believed there was a ten-percent safe harbor in state legislative redistricting. Judge Wake explained,

> There is a burden-shifting framework for population deviation claims. Generally, a legislative apportionment plan with a maximum population deviation greater than 10% creates a prima facie case of discrimination and therefore must be justified by the state. The plan may include 'minor deviations,' which is a technical term meaning less than 10%, free from arbitrariness or discrimination.

Harris, J.S. App. at 115a-116a.[39]

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38. Stevens, J., concurring, joined by Breyer, J.

39. Citing *Brown* v. *Thomson*, 462 U.S. 835, 842-43 (1983); see

The Arizona voters challenging the commission's reapportionment scheme satisfied this burden by showing the apportionment was "arbitrary or discriminatory" and not the result of a legitimate and rational state policy.[40]

Because the one-person, one-vote principle is of constitutional import, this Court has never held that there is *any* safe harbor for its breach. This point is particularly important because this Court has never said mapmakers are granted a ten-percent haven to draw electoral maps to achieve partisan advantage.

In *Brown* v. *Thomson*, this Court explained that a deviation of more than ten percent was "justified *on the basis of Wyoming's longstanding and legitimate policy* of preserving county boundaries. Particularly where there is no 'taint of arbitrariness or discrimination,' substantial deference is to be accorded the political decisions of the people of a State *acting through their elected representatives.*" 462 U.S. 835, 847-48 (1983) (citation omitted; emphasis added). But "[a]rbitrariness and discrimination disqualify even 'minor' population inequality within 10%." *Harris*, J.S. App. at 116a (Wake, J., dissenting); see also *Chapman* v. *Meier*, 420 U.S. 1,

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also *Connor* v. *Finch*, 431 U.S. 407, 417-18 (1977); *White* v. *Regester*, 412 U.S. 755, 764 (1973).

40. This Court has adopted a slightly stricter standard in congressional redistricting cases. *Tennant* v. *Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 5 (2012) (the "standard [in congressional redistricting cases] does not require that congressional districts be drawn with 'precise mathematical equality,' but instead that the State justify population differences between districts that could have been avoided by 'a good-faith effort to achieve absolute equality'") (quoting *Karcher*, 462 U.S. at 730); see also *Harris*, J.S. App. at 116a n.1.

25-26 (1975) (noting that redistricting plan with less than six-percent population deviation may not "necessarily *** be permissible in a court-ordered plan").[41]

So what do we make of this "ten-percent rule?" First, it is definitely not a "safe harbor" allowing reapportionment schemes that unequally apportions citizens such that their votes are diluted by just less than ten-percent. Second, the "ten-percent rule" is a burden-shifting standard derived from the deference this Court affords elected state legislatures. The "ten-percent rule" has never been invoked to defend an unequal apportionment drawn for partisan advantage by an unelected and politically unaccountable body such as the commission. More on this point below.

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41. *See also Rodriguez* v. *Pataki*, 308 F. Supp. 2d 346, 364 (S.D.N.Y. 2004) ("We think that *** the 'ten percent rule' is not meant to protect a state that is systematically disadvantaging groups of voters with no permissible rational justification for the disproportion."); *Marylanders for Fair Representation, Inc.* v. *Schaefer*, 849 F. Supp. 1022, 1033 (D. Md. 1994) ("[T]his Court holds that a plaintiff could, with appropriate proof, successfully challenge a redistricting plan with a maximum deviation below ten percent."); *Larios*, 300 F. Supp. 2d at 1340-41; *Moore* v. *Itawamba Cnty., Miss.*, 431 F.3d 257, 259 (5th Cir. 2005) ("The formulaic [ten percent] threshold is not an absolute determinant. Rather, it effectively allocates the burden of proof. Population deviation less than ten percent, for example, is not *per se* nondiscriminatory and is not an absolute bar to a claim of vote dilution.")

B. Overturning the commission's unequal redistricting scheme does not require this Court to jump into the "political thicket" and engage in a standardless supervision of state reapportionment.

[T]he equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength.

Cox, 542 U.S.at 949-50.[42]

i. The one-person, one-vote principle we ask this Court to apply is an easily administered justiciable standard.

Justice Frankfurter cautioned against this Court "enter[ing] this political thicket." *Colegrove* v. *Green*, 328 U.S. 549, 556 (1946). *Colegrove* was the case Justice Stevens referenced when he dissented in *Vieth*.[43]

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42. Stevens, J. concurring, joined by Breyer, J.

43. "When I was in law school in Illinois in 1946, a statute enacted over four decades earlier still defined the boundaries of congressional districts in that state. A suburban district with a population of 112,000 had the same representatives as an urban district with 900,000 residents. It was a case rejecting a constitutional challenge to that undemocratic allocation on justiciability grounds that Justice Frankfurter used his famous metaphor cautioning the judiciary to stay out of the political thicket. Fortunately the metaphor did not carry the day when our later decisions in Baker against Carr and Reynolds against Sims paved the path to our one-person, one-vote jurisprudence." *Vieth* v. *Jubelirer*, No. 02-1580, opinion announcement transcript, April 28, 2004 (Stevens, J., dissenting), available at: <http://www.oyez.org/cases/2000-2009/2003/2003_02_1580> (last visited August 25, 2015).

ii. Invalidating the commission's unequal reapportionment scheme does not violate this Court's deference to state legislatures drawing their own reapportionment.

As Justice Scalia explained in the plurality decision in *Vieth*, the principle reason this Court overruled its earlier decision in *Davis* v. *Bandemer*, 478 U.S. 109 (1986), was because a majority found political gerrymandering is not justifiable because this Court was unable "to enunciate [a] judicially discernible and manageable standard." *Vieth*, 541 U.S. at 305-06.

These concerns are not present here. This is not a political gerrymandering case. We do not ask this Court to devise standards to ascertain political motivations nor to create a test for a politically "fair" reapportionment scheme. We are glad for this Court to "defer to state districting authorities' actual, substantial, and honest pursuit of a legitimate means for a legitimate purpose" even when the reapportionment results in minor population deviations. *Harris*, J.S. App. at 139a (Wake, J., dissenting).

Rather we ask this Court to apply its easily-administered requirement that, when a state's redistricting scheme deviates from the one-person, one-vote ideal of equally-populated legislative districts the deviation must be in furtherance of a legitimate justification based upon the traditional redistricting criteria of compactness, contiguity and preserving political subdivisions and communities of interest.

If a reapportionment scheme makes minor deviations from this equal-population standard to accommodate

one of these legitimate neutral considerations, the plan is appropriate. Or, even if a reapportionment scheme is devised to achieve political advantage for one political party but the districts are still equally-populated, the scheme need not be invalidated.

But when a redistricting scheme, as here, deviates from equally-populated districts to achieve an end that is not legitimate (such as gaining partisan advantage or obtaining preclearance under the Voting Rights Act formula this Court has declared to be unconstitutional), this Court should invalidate that scheme as violating the Equal Protection Clause. The trigger for this Court's scrutiny is the deviation from the ideal. If the districts are equal this Court need look no further. If the districts are not equally populated, this Court should inquire into the justification for the deviation and, if the reason for the deviation is not one of the traditional neutral redistricting criteria, the reapportionment scheme should be invalidated and the districts redrawn.[44]

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44. Justice Kennedy noted an additional concern the commission's reapportionment scheme presents. Allowing partisan advantage to justify deviating from the one-person, one-vote principle is also inconsistent with First Amendment principles of speech and association. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring)

The government is not permitted to burden or penalize citizens "because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Ibid.* (citing *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality op.); and *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000). When "a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views" the First Amendment is implicated. *Ibid.*

As Justice Scalia observed, "[w]hen reviewing States' redistricting of their own legislative boundaries, we have been appropriately deferential." *Cox*, 542 U.S. at 951 (Scalia, J., dissenting from summary affirmance) (citing *Mahan* v. *Howell*, 410 U.S. 315, 327 (1973)).

But this principle of deference to sovereign state legislatures does not apply here. The proposition that federal courts should defer to States reapportioning their own legislature is grounded on principles of federalism and the understanding that state legislatures are politically accountable to their electorate. When state legislatures reapportion their own legislative districts the legislature is politically accountable to the electorate and, should the legislature malapportion its districts, subsequent legislatures can reapportion the state to correct an overreach by one party. See Justice Kennedy's comments during argument in *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006).[45]

Justice Kennedy concluded, "First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights" based solely on their association with a political party or their concomitant expression of their political views. *Ibid.*

Addressing Justice Kennedy's concerns here does not require the Court to eliminate political considerations from reapportionment, or even conclude redistricting to achieve a political advantage creates a First Amendment claim. Instead, all we suggest is that, the desire to obtain partisan advantage, does not justify deviating from the one-person, one-vote ideal.

45. "If you know as a legislature when you do a decennial districting, that your program is going to be presumptively valid or not subject to partisan gerrymandering, then *** then you're *** liable to overreach. And it seems to me very dangerous for this Court

The commission is removed from electoral accountability. As Justice Thomas observed, the Arizona ballot initiative, Proposition 106, that created the commission "was unusually democracy-reducing. It did not ask the people to approve a particular redistricting plan through direct democracy, but instead to take districting away from the people's representatives and give it to an unelected committee, thereby reducing democratic control over the process in the future." *Ariz. State Legislature*, 135 S. Ct. at 2698 (Thomas, J. dissenting).[46] And the majority of this Court upheld this scheme against an Election Clause challenge. But there the commission drew equally-populated congressional districts. Not so here. And there is no mechanism to redraw these districts until the next decade.

Justice Kennedy's point in *Perry* was that partisan "overreach" in a reapportionment plan by a legislature is subject to oversight by the electorate and "can be corrected."[47] And Justice Thomas' point is that the Arizona

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to take away that control mechanism that exists so that legislatures know that there's a possibility that if they overreach, they can be corrected." Oral Argument Transcript (Mar. 1, 2006), pp. 22-23.

46. The *per curiam* decision concluded that "members of [the commission] cannot assert a legislative evidentiary privilege." *Harris*, J.S. App. at 55a. The district court reached this holding because, "[u]nlike legislators, the commissioners have no other public duties" and the commissioners "cannot hold elective office during or for the three years following their service on the Commission." *Ibid.*

47. See also Justice Kennedy's hypothetical in *Alabama Legislative Black Caucus*, Oral Argument Tr., pp. 8-10:

> Suppose there [is] Party A in 2001 [that] takes minorities out of heavily minority districts and puts

commission that created this reapportionment scheme is removed for any electoral oversight and thus not subject to correction by electoral oversight. The *per curiam* decision noted, "They [the members of the commission] cannot be defeated at the ballot box because they don't stand for election. Indeed, the process is not supposed to be governed by what happens at the ballot box." *Harris*, J.S. App. at 57a.

When a political party (and it does not matter which party) gains control of an unaccountable body reapportioning the state for the next decade, the process is unchecked by the restraints of political accountability to which Justice Kennedy referenced. This was demonstrated when two-thirds of the Arizona Senate and Arizona's Governor sought to remove the commission's chairwoman and could not do so. See *Brewer*, 275 P.3d at 1274.

Precisely because the commission is removed from political constraints and electoral accountability this Court should exercise scrutiny. Recall this Court's admonition that "careful judicial scrutiny" must be given when evaluating "state apportionment schemes." *Reynolds*, 377 U.S. at 581. This admonition particularly applies when the reapportionment scheme is drawn by a

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them into opportunity districts for political purposes. *** Party B then gets into power ten years later. It wants to undo what Party A did, and it puts them back into heavily populated districts. Is there a violation when Party B does that? *** but it's purely partisan. *** they find minority voters and put them into minority opportunity districts. Then the next party comes in and simply undoes it, and uses the same calculus, race?

politically-unaccountable body not subject to the electoral constraints Justice Kennedy noted.

The commission is not Arizona's Legislature. Nonetheless the majority of this Court upheld the commission's authority to redistrict Arizona's congressional delegation against an Election Clause challenge. This Court found the commission was created as a "high-minded" endeavor to remove partisanship from the congressional redistricting process. See *Ariz. State Legislature*, 135 S. Ct. at 2675; *id.* at 2691-92 (Roberts, C.J., dissenting). But, even if one believes the endeavor succeeded and the commission truly operated in an "independent" and non-partisan manner, the commission's reapportionment is still subject to judicial scrutiny and the one-person, one-vote principle of the Equal Protection Clause.

For Arizona's experiment, seeking to remove politics from redistricting to succeed, the work of the commission must still be subject to judicial review and the one-person, one-vote principle.

CONCLUSION

Our Constitution protects people not percentages.[48] The malapportioned legislative districts the commission created mean the votes of nearly two million Arizona citizens are diluted or inflated. This is unacceptable and unjustified. The Equal Protection Clause "guarantees the opportunity for equal participation by all voters in the election of state legislators." *Reynolds*, 377 U.S. at 566. A state can deviate from this Court's one-person, one-vote principle by minor deviations but only "based on legitimate considerations incident to the effectuation of a rational state policy ***." *Id.* at 579. And the reason for the deviation must be "free from any taint of arbitrariness or discrimination." *Roman*, 377 U.S. at 710.

Arizona has no policy directing its legislature be reapportioned to tilt the political playing field in favor of the Democrat Party. And unequally apportioning Arizona's legislature for the next decade to obtain preclearance from Justice Department lawyers when this Court has struck down the preclearance scheme in *Shelby County* is not a legitimate reason to dilute or inflate the votes of nearly two million citizens in sixty-percent of Arizona's legislative districts. By doing so the commission denied individual Arizona citizens the constitutionally-guaranteed right to equal protection by diluting the weight of their votes.

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48. See *Reynolds*, 377 U.S. at 562. "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."

The simplest conclusion is found in four words: "Judge Wake is right." Judge Wake's analysis and reasoning was not only correct as a matter of undisputed fact, his conclusions are a faithful application of this Court's Equal Protection Clause jurisprudence.

Accordingly this Court should reverse and remand the district court's *per curiam* decision and direct the commission to reapportion Arizona's legislature conforming to the requirements of the United States and Arizona Constitutions which require each legislative district be equally populated.

Respectfully submitted,

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IN THE
Supreme Court of the United States

WESLEY W. HARRIS, ET AL.,
Appellants,

v.

ARIZONA INDEPENDENT
REDISTRICTING COMMISSION, ET AL.
Appellees.

On Appeal from the United States
District Court for the District of Arizona

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QUESTIONS PRESENTED

1. Does the desire to gain partisan advantage for one political party justify intentionally creating over-populated legislative districts that result in tens of thousands of individual voters being denied Equal Protection because their individual votes are devalued, violating the one-person, one-vote principle?

2. Does the desire to obtain favorable preclearance review by the Justice Department permit the creation of legislative districts that deviate from the one-person, one-vote principle? And, even if creating unequal districts to obtain preclearance approval was once justified, is this still a legitimate justification after *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)?

LIST OF PARTIES

Appellants are Wesley W. Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Beth K. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, Karen M. McKean, and Sharese Steffans.

Appellees are the Arizona Independent Redistricting Commission (the "Commission") and Michele Reagan, Secretary of the State of Arizona (the "Secretary").

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OPINIONS BELOW

The district court's *per curiam* opinion and order is reported at 993 F. Supp. 2d 1042 and is reprinted at pages 4 to 81 of the Appendix to the Jurisdictional Statement ("J.S. App.") of No. 14-232.

Judge Silver's separate opinion, concurring in part, dissenting in part, and concurring in the judgment, is reprinted at J.S. App. 82a-104a.

Judge Wake's separate opinion, concurring in part, dissenting in part, and dissenting from the judgment, is reprinted at J.S. App. 105a-145a.

JURISDICTION

The district court's opinion and order affirming Arizona's state legislative map was entered on April 29, 2014. This Court's jurisdiction is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the addendum to this brief.

INTRODUCTION

This should not be a difficult case. Appellants brought a one-person, one-vote challenge to minor population variations—averaging just 2.2%—in Arizona's 2010 state legislative map. Appellants claim the variations resulted from pro-Democratic partisanship on the part of the Arizona Independent Redistricting Commission ("the Commission"). The district court found as fact that the Commission's predominant purpose was not partisanship. And the effects were not partisan either: Elections under the map have mirrored the state's party registration and, if anything, Republicans have modestly *over*achieved.

This Court has long held that *de minimis* population variations in state legislative reapportionment, such as those at issue here, do not implicate the Constitution or require justification by the state. *Connor v. Finch*, 431 U.S. 407, 418 (1977). And even if justification is required, the only question is whether the state acted in "good faith" and "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds v. Sims*, 377 U.S. 533, 577, 579 (1964). The district court correctly concluded that the Commission satisfied that standard, finding after a week-long trial that the minor deviations resulted from the Commission's good-faith efforts to obtain preclearance under Section 5 of the Voting Rights Act and to achieve other traditional state redistricting objectives. Appellants nowhere challenge the district court's factual findings as clearly erroneous. This Court can and should affirm on the basis of the lower court's factual findings alone.

Given the trial court's findings, Appellants are forced to (1) challenge decades of settled precedent by arguing that *any* population deviations, no matter how *de minimis*, require justification, (2) contend that a desire to obtain preclearance under Section 5 of the Voting Rights Act cannot provide a justification for *de minimis* deviations, and (3) further contend that if any of the participants in the line-drawing process had even the slightest partisan motivation, any departure from absolutely perfect population equality is unconstitutional. Appellants' arguments (if endorsed) would prompt challenges to essentially every state, county, and local redistricting plan in the country. This Court should reject Appellants' invitation to radically rewrite the one-person, one-vote doctrine in a manner that would ensure continual and intrusive federal oversight of one of a state's most sovereign functions—legislative redistricting.

STATEMENT OF THE CASE

I. The Arizona Independent Redistricting Commission.

In 2000, by popular initiative, the people of Arizona enacted an amendment to their state constitution, withdrawing redistricting authority from their state legislature and vesting it in the Commission. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) ("*AIRC*"). The Arizona constitution requires that the Commission convene after each decennial census to draw Arizona's congressional and state legislative districts. The Commission consists of five members. "The highest ranking officer and minority leader of each chamber of

[Arizona's] legislature each select one member of the [Commission] from a list compiled by Arizona's Commission on Appellate Court Appointments." *Id.* at 2661. These four politically appointed members then select a chairperson from a list of five candidates who cannot have been registered with either of the two largest political parties in Arizona in the preceding three years. Ariz. Const. art. IV, pt. 2, § 1(5)-(6).

Once constituted, the Commission must draw Arizona's nine congressional and thirty state legislative districts. *Id.* § 1(14). Each of the thirty state legislative districts elects one senator and two representatives. *Id.* § 1(1). To begin the process, the Commission must draw districts in a "grid-like pattern across the state." *Id.* § 1(14). Then, the Commission must adjust districts to advance the specific state interests enumerated in the Arizona constitution. *Id.* § 1(14).

The first state interest is mandatory: Districts must comply with the federal Constitution and the Voting Rights Act. *Id.* § 1(14)(A). The other enumerated goals are secondary and must be accommodated "to the extent practicable." *Id.* § 1(14)(B)-(F). These goals include creating compact and contiguous districts; respecting communities of interest, political subdivisions, and visible geographic features; and pursuing population equality. *Id.* § 1(14)(B)-(E). Additionally, the Commission must make districts more competitive, unless improving competitiveness poses a "significant detriment" to other goals. *Id.* § 1(14)(F); *see also Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep.*

Redistricting Comm'n, 208 P.3d 676, 687 (Ariz. 2009). The Commission may not consider where incumbents or candidates live. Ariz. Const. art. IV, pt. 2 § 1(15). It also may not examine party registration and voting history, except to comply with districting goals enumerated in Arizona's constitution. *Id.* § 1(15).

Once it has completed a draft map, the Commission must advertise the map to the public for comment for thirty days. *Id.* § 1(16). After the public comment period and any final revisions, the Commission approves a final map. *Id.* § 1(16). All of the Commission's work must be completed "in meetings open to the public." *Id.* § 1(12).

II. The 2010 Redistricting Cycle.

During the 2010 redistricting cycle, the five members of the Commission were Richard Stertz and Scott Freeman, the Republican appointees; Jose Herrera and Linda McNulty, the Democratic appointees; and Colleen Mathis, the independent chair. The four politically appointed commissioners unanimously selected Mathis to be chair. J.S. App. 14a.

In approaching their task, all five commissioners recognized that their obligation to comply with the districting principles enumerated in Arizona's constitution would be complicated by the state's idiosyncratic population distribution, its unique history, and its rapidly changing demographics. Nearly 60% of Arizona's population lives in Maricopa County, and many of the state's more rural counties are sparsely

populated.[1] These factors make it difficult to equalize population across Arizona's state legislative districts. Trial Tr. 126:15-17. Moreover, the state contains diffuse communities of interest, including, for example, current and former copper mining communities spanning over 2,000 square miles, *see* Trial Ex. 404 at 139:15-21, and 21 Native American reservations scattered across the state. Arizona has also experienced significant growth in its Hispanic population, which comprised 25.3% of the state's population in 2000 and 29.6% of its population by 2010.[2] Growth in Arizona's Hispanic population accounted for 47.5% of the state's total population growth during this time period.[3]

The Commission's approach to redistricting was thorough and transparent. Over the course of eleven

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[1] *See* United States Census Bureau, 2010 Census: Compare Counties For Population, Housing Units, Area, and Density, http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml (last visited Oct. 21, 2015) (search Arizona in Community Facts search bar).

[2] *Compare* United States Census Bureau, Census 2000: General Demographic Characteristics, *with* United States Census Bureau, 2010 Census: General Population and Housing characteristics, http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml (last visited Oct. 21, 2015) (search Arizona in Community Facts search bar).

[3] *Compare* United States Census Bureau, Census 2000: General Demographic Characteristics, *with* United States Census Bureau, 2010 Census: General Population and Housing characteristics, http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml (last visited Oct. 21, 2015) (search Arizona in Community Facts search bar).

months, the Commission held 58 public meetings and 43 public hearings across the state. These sessions were exhaustive and well attended. They lasted more than 350 hours, attracted more than 5,300 people, and drew more than 1,800 online viewers. At its meetings and hearings, the Commission entertained 2,350 requests to speak from members of the public. The Commission also solicited additional input. The people of Arizona submitted 7,403 written comments and 224 proposed state legislative maps. All of this information guided the Commission's application of the redistricting criteria enumerated in Arizona's constitution.[4]

To evaluate the public testimony it received and navigate the state's geographic and demographic challenges, the Commission adopted an iterative mapmaking process that was at all times guided by the obligation to comply with state and federal law. Each map the Commission considered was made available for public view, as were all underlying data.[5] When the Commission adopted any change to a draft map, it did so in a public forum after the opportunity for detailed discussion. Trial Tr. 413:12-414:14. All discussions

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[4] *See* News Release, Arizona Independent Redistricting Commission, Public Had Strong Influence on Redistricting (Feb. 3, 2012), http://azredistricting.org/News-Releases/docs/020312.pdf.

[5] *See* Arizona Independent Redistricting Commission, http://azredistricting.org/ (last visited Oct. 21, 2015) (navigate through "Maps").

were recorded in transcripts subsequently published on the Commission's website.[6]

Although the commissioners had many debates and disagreements before they approved a draft map (on a 4-1 vote), all but one change to the draft map were approved unanimously. J.S. App. 33a-34a. Many of these changes resulted in deviations from perfect population equality.

A. Compliance With Section 5 Of The Voting Rights Act.

Throughout the 2010 redistricting cycle, Arizona was a covered jurisdiction under Section 4(b) of the Voting Rights Act and therefore subject to the preclearance requirements set forth in Section 5 of the Voting Rights Act. Under Section 5 as it applied at the time, a covered jurisdiction could not implement a redistricting proposal until it was precleared by the Justice Department or the United States District Court for the District of Columbia. 52 U.S.C. § 10304(a). A covered jurisdiction could obtain preclearance only if it could demonstrate that its proposed redistricting plan would not result in "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). In prior redistricting cycles, Arizona had never obtained preclearance on its first attempt. J.S. App. 24a.

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[6] *See* Arizona Independent Redistricting Commission, http://azredistricting.org/ (last visited Oct. 21, 2015) (navigate through "Meeting Info").

For Arizona, the consequences of failing to obtain preclearance were significant. Such a failure would likely result in holding elections under a map imposed by a federal court, as the state did during the 2000 redistricting cycle. *See Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998 (D. Ariz. 2002). Failure to obtain preclearance would also make Arizona ineligible to "bail out" of its Section 5 obligations for another decade. J.S. App. 24a. And failure to achieve preclearance would impose monetary costs on taxpayers, who would pay for any subsequent litigation and additional rounds of mapmaking. Each commissioner therefore considered obtaining preclearance on the first try to be the Commission's paramount goal. J.S. App. 23a-24a; *see also* Supplemental Appendix to Motion to Dismiss ("Supp. App.") 2, 5, 12-13, 17.

To comply with Section 5, the first task is to identify the "benchmark" number of minority "ability-to-elect" districts—that is, how many districts in the map used during the prior redistricting cycle afforded minorities the ability to elect candidates of their choice. The Justice Department makes this judgment by relying on a functional analysis of census data, group voting patterns, electoral history, voter turnout, and other demographic information. J.S. App. 21a-22a. The Department does not tell covered jurisdictions how many ability-to-elect districts exist in the benchmark map. J.S. App. 22a-23a. Nor does the Department disclose precisely how it performs its functional analysis. *See* J.S. App. 22a; Trial Tr. 983:13-984:11. The Department does not use any bright-line rule for the

percentage of minority population required to establish an ability-to-elect district, and a district can be an ability-to-elect district even if the relevant minority population comprises less than a majority. J.S. App. 22a, 25a, 27a.

Given that it had identified first-try preclearance as a paramount goal, the Commission at the outset of its process attempted to determine the number of ability-to-elect districts in its benchmark map. Consulting data on voting history, turnout, election performance, and racial polarization, the Commission's legal team—which was comprised of attorneys affiliated with both major political parties—concluded that the benchmark map included ten ability-to-elect districts.[7] J.S. App. 27a. The team advising the Commission also included the former Justice Department official who led the team that refused preclearance to Arizona's map in the 2000 redistricting cycle. J.S. App. 25a. Like the Commission's legal team, he ultimately concluded that the benchmark map contained ten ability-to-elect districts. J.S. App. 26a, 30a.

All of the commissioners agreed that the Commission needed ten ability-to-elect districts: nine

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[7] The Commission selected its attorneys through an evaluation process overseen by Arizona's State Procurement Office. J.S. App. 15a. By a 3-2 vote, the Commission selected the most favorably evaluated attorneys to serve as counsel. J.S. App. 15a-16a. Although the dissenting commissioners would have selected different attorneys to represent the Commission, they had no objection to counsel's performance. Trial Tr. 223:22-224:3 (testimony of Commissioner Stertz), 887:6-9 (testimony of Commissioner Freeman).

where Hispanic communities could elect their preferred candidate, and one where Native American communities could elect their preferred candidate.[8] J.S. App. 39a. Thus, "[t]here was not a partisan divide on the question of whether ten districts was an appropriate target." *Id.*[9]

The Commission thus set out to ensure its new map had ten ability-to-elect districts. Throughout the process of creating these districts, the commissioners obtained feedback about how each adjustment to district lines affected other districting criteria, including population deviations. J.S. App. 28a. Counsel advised the Commission that minor population deviations were permissible if they resulted from an attempt to comply with the Voting Rights Act. *Id.* Counsel also advised that minor population deviations were permissible if they resulted from the Commission's pursuit of other state interests, including traditional districting goals like maintaining the integrity of communities of interest and municipal boundaries. Supp. App. 35, 37. Counsel emphasized that the Commission should "try and keep the range [of population deviations] as minimal as possible." Supp. App. 36.[10]

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[8] Commissioner Herrera initially objected to creating a tenth ability-to-elect district but reconsidered his view. Trial Tr. 268:10-269:1.

[9] Indeed, in comments filed with the Commission, counsel for Appellants urged the creation of nine Hispanic majority districts. Joint Appendix ("J.A.") 22a.

[10] Additionally, the Commission's mapping consultant advised that population deviations would shift as the decade progressed. J.S.

On October 10, 2011, by a 4-1 vote, the Commission approved a draft map that attempted to create ten ability-to-elect districts and contained minor population deviations.[11] J.S. App. 28a. The Commission then published its draft map for a period of public comment. On November 29, 2011, the Commission reconvened to consider the public's comments and make final adjustments to the state legislative boundaries.[12] At that time, the Commission reviewed a draft racial polarization analysis from Dr. Gary King, Director of the Institute for Quantitative Social Science at Harvard University. J.S. App. 26a, 30a. Dr. King's initial analysis indicated that the Commission's ten districts would likely offer minorities the ability to elect candidates of choice. J.S. App. 30a. However, the

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App. 31a; Supp. App. 22. The Commission's mapping consultant observed that underpopulated districts containing significant Hispanic populations would likely become overpopulated because the state's Hispanic population was growing at a greater rate than the population of other demographic groups. J.S. App. 31a; Supp. App. 22.

[11] Richard Stertz, the Republican-appointed commissioner who voted against the draft map, felt the Commission could have done more to advance certain districting criteria enumerated in the Arizona constitution. J.S. App. 39a. However, he did not object to population deviations resulting from the Commission's attempt to create ten ability-to-elect districts. J.S. App. 39a.

[12] The public comment period expired on November 9, 2011, but the Commission was delayed in completing its work because the governor and state senate removed Chair Mathis from her post. The Commission could resume its work only after the Arizona Supreme Court held that the removal had no legal basis and reinstated the Commission's independent chair. *See AIRC*, 135 S. Ct. at 2661 n.5.

Commission remained uncertain about whether the Justice Department would reach the same conclusion after conducting its own functional analysis, particularly with respect to legislative district ("LD") 24 and LD26. J.S. App. 30a, 40a; *see also* Supp. App. 38; Trial Ex. 395 at 159:16-177:24.

Over subsequent weeks, the Commission adopted several changes to strengthen the ability-to-elect districts. Each change passed unanimously. J.S. App. 39a. Many were intended to improve ability-to-elect in LD24 and LD26. *See* Def.'s Post-Trial Br. 14-21, ECF No. 219 (discussing changes to each ability-to-elect district). The Commission's adjustments to LD24 and LD26 increased Hispanic voting-age population by 2.3 and 1.6 percentage points, respectively. J.S. App. 31a. Total Hispanic population increased by 2.7 percentage points and 1.7 percentage points, respectively. *Id.* These adjustments also resulted in minor changes to the population deviations that existed in the draft map. J.S. App. 32a. In the Commission's final map, LD24 was underpopulated by 3.0% and LD26 was overpopulated by 0.3%. *Id.*; Supplemental Joint Appendix ("S.J.A.") 59.

The Commission approved its final state legislative map on January 17, 2012.[13] J.S. App. 35a. It then submitted the map for preclearance. *Id.* The Commission intended its submission to present the strongest case for preclearance. As a result, the Commission argued that the benchmark map contained

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[13] The final map passed by a 3-2 vote, with Commissioners Freeman and Stertz voting against the map. J.S. App. 35a.

only seven ability-to-elect districts. J.S. App. 73a-74a. However, the Commission acknowledged that the benchmark map might contain more districts that allowed minorities to elect their preferred candidate and asserted that its map contained ten ability-to-elect districts. J.S. App. 35a; Trial Ex. 530 at 139. The Commission also argued that the map contained another district that offered a Hispanic community some opportunity to elect: LD8. J.S. App. 35a. The Justice Department precleared the Commission's map on April 26, 2012. *Id.*

The Commission's final map includes twelve districts with minor negative deviations from perfect population equality. S.J.A. 59. Ten of these districts offer protected minority groups an ability or opportunity to elect. *See id.*; Trial Ex. 530 at 82-83 (identifying ability-to-elect districts and noting that LD8 increased the likelihood that protected minority groups could elect their preferred candidate relative to benchmark LD23). Of those ten, nine contain a plurality of registered Democrats. S.J.A. 62. Of the remaining two districts with minor negative variations, one contains a plurality of registered Democrats and the other a plurality of registered Republicans. *Id.* The final map has an average deviation of just 2.2% from perfect population equality and a maximum deviation of 8.8%.[14] *See* J.S. App. 9a-10a, 12a.

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[14] Maximum deviation is the total difference in percentage points between the population deviation in the most over- and underpopulated districts. J.S. App. 12a.

B. Pursuit Of Traditional Districting Criteria.

While adjusting the draft map to achieve its paramount goal of first-attempt preclearance, the Commission made simultaneous adjustments to accommodate the other redistricting criteria enumerated in Arizona's constitution "to the extent practicable." Ariz. Const. art. IV, pt. 2, § 1(14)(B)-(F). These criteria included respecting communities of interest, keeping counties together, and improving compactness. Dr. Bruce Cain, a professor of political science at Stanford and the Commission's expert at trial, observed that the Commission effectively implemented these neutral redistricting criteria—for example by drawing compact districts and minimizing city and county splits. J.A. 49a. Many of the adjustments the Commission made to achieve this success resulted, incidentally but inevitably, in deviations from strict population equality. J.A. 28a.

LD2 is illustrative. LD2 is an ability-to-elect district in southern Arizona that incorporates parts of the city of Tucson and Santa Cruz County, which borders Mexico. S.J.A. 56, 58. After reconvening to adjust its draft map, the Commission adopted several modifications to LD2's boundaries. Each promoted a neutral districting goal, but effected some population deviation. To make the district more compact and unify a political subdivision, the Commission shifted a portion of Cochise County from LD2 into the neighboring LD14, which encompassed the rest of Cochise County. Supp. App. 2-4, 32-33. To protect communities of interest, the Commission altered boundaries in several

areas, like Rita Ranch (a residential area split between two districts in the draft map). Trial Ex. 405 at 86:16-110:16. Some of these changes removed population from LD2 and others added population. *Compare* Supp. App. 2-4, *with* Trial Ex. 405 at 97:5-10. On balance, the changes resulted in a more negative—but still minor—deviation from perfect population equality. LD2 was underpopulated by 0.1% in the draft map and by 4.0% in the final map. *Compare* Trial Ex. 420 at 217-218, *with* S.J.A. 59.

Other changes designed to effectuate neutral redistricting principles also resulted in minor negative population deviations. For example, the Commission accommodated several communities that requested to be moved out of LD7, the district designed to allow Arizona's Native American communities to elect a candidate of their choice. *See* Supp. App. 3-4, 7-8. These changes unified the non-reservation portions of one county (Mohave) and maintained the entirety of another rural county (Greenlee) in a different district. *See* Supp. App. 7-8. Each change required removing population from the district, which deviated from strict population equality by 1.3% in the draft map, and 4.7% in the final map. *Compare* Trial Ex. 420 at 217, *with* S.J.A. 59.

To implement neutral districting principles, the Commission also adjusted district boundaries in other ability-to-elect districts, including three districts in the Phoenix area: LD24, LD29, and LD30. In LD24, the Commission removed the Fort McDowell reservation, situating it in LD23 at the request of reservation leaders. Trial Ex. 403 at 57:4-6. In LD29 and LD30,

the Commission made technical adjustments before adopting its final map, several of which required removing population to avoid splitting county voting precincts, at the request of county officials. Trial Tr. 786:5-787:13; Trial Ex. 420 at 466, 479-80. Each of these decisions advanced a neutral districting goal. Each also resulted in a slight departure from perfect population equality.

Districting criteria enumerated in Arizona's constitution were often at odds with perfect population equality. As one commissioner stated in an early public hearing: "[E]very time you move a district to refine a population imbalance, you end up changing all the other districts." Trial Ex. 358 at 109:5-7; *see also* J.A. 28a (expert report of Bruce Cain). For example, LD12 is located in the eastern part of the Phoenix metropolitan area. It is not an ability-to-elect district. LD12 was overpopulated for several reasons, including the Commission's decisions to protect the integrity of several political subdivisions. Trial Ex. 406 at 217:3-21. At least one member of the Commission attempted to reduce the population deviation in LD12, but found the Commission could not do so without undermining other neutral districting principles. *Id.* Ultimately, the Commission decided it could not reduce the population deviations in LD12 without compromising other principles.

Although the Commission could not eliminate all minor population deviations without upsetting its

pursuit of other traditional districting criteria,[15] members of the Commission recognized their obligation to minimize deviations under state and federal law. Before it approved a final map, the Commission reduced already minor population deviations in several districts. Supp. App. 34-35; 41-47. For example, on December 16, 2011, the Commission made changes that reduced the total population deviation in LD1 by 3 percentage points, in LD6 by 4.2 percentage points, in LD9 by 4.8 percentage points, and in LD14 by 1.8 percentage points. Supp. App. 45-47. These changes, and others,[16] reduced the average deviation in the Commission's final map to just 2.2%. J.S. App. 9a-10a. The Commission's final map contained a maximum deviation of only 8.8%, J.S. App. 12a, well within the norm of deviations observed in other jurisdictions.[17]

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[15] There is no evidence the Commission could have implemented traditional districting criteria as it did and further reduced population deviations. Appellants offered as a purported alternative the state legislative map drawn by their expert, Dr. Thomas Hofeller. But, as the court below found, Dr. Hofeller's map presented no viable alternative because it did not take into account *any* traditional districting criteria and contained only eight ability-to-elect districts, none of which had been evaluated using racial polarization data. J.S. App. 74a-75a.

[16] *See, e.g.*, Trial Ex. 406 at 214:2-215:8, 221:23-225:17 (discussing population balancing in LD16 and LD25).

[17] *See* National Conference of State Legislatures, 2010 NCSL Congressional and State Legislative Redistricting Deviation Table, http://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx (last visited Oct. 21, 2015).

C. Lack Of Partisan Bias.

Throughout the mapmaking process, members of the Commission worked jointly and often by consensus to balance the districting criteria identified in Arizona's constitution. *See, e.g.*, Trial Ex. 405 at 70:2-17 (consensus in accommodating communities of interest in Maricopa County); Trial Ex. 406 at 207:16-208:19 (consensus in implementing traditional districting criteria in LD5, LD9, LD10, LD13, and LD14); *id.* at 204:24-205:10 (consensus in revising LD13 and protecting political subdivisions). The population deviations at issue in this case arose in the modifications the Commission made between approval of the draft map and approval of the final map. During that time, the Commission made several changes to effectuate the districting goals enumerated in Arizona's constitution. The only change adopted by a divided vote concerned LD8. J.S. App. 34a.

As to LD8, one of the Democratic-appointed commissioners suggested altering the district's boundaries to make it more competitive. J.S. App. 32a. She later suggested the proposed changes might create an ability-to-elect district. J.S. App. 33a. The Commission's Voting Rights Act consultant agreed that the proposed changes might transform LD8 into an ability-to-elect district. J.S. App. 33a, 42a. The Commission's counsel advised that presenting an additional ability-to-elect district could help the Commission obtain preclearance because the Justice Department might question whether LD26 in fact offered an ability to elect. J.S. App. 33a, 42a. Only after receiving this guidance did the Commission—in a

divided vote—approve the proposed changes to LD8, which increased the Hispanic community's district-wide share of the voting age population from 22.8% to 31.3%, and its district-wide share of the total population from 25.9% to 34.8%. J.S. App. 34a, 42a. The revisions to LD8 resulted in changing the population deviation from 1.5% over the ideal to 2.3% less than the ideal. J.S. App. 34a. Without any reference to the population deviations, the Republican-appointed commissioners disagreed with the revisions made to LD8, which they perceived as changing a Republican-leaning district into a Democratic-leaning district. *Id.*[18]

Ultimately, however, the map the Commission adopted fairly reflected the partisan balance of the state, with a slight pro-Republican bias. In June 2012, the Republican Party's share of Arizona's state-wide two-party registration was 54.4%. J.S. App. 98a. In the 2012 election, the Republican Party won 60% of House seats and 57% of Senate seats.[19] In the 2014

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[18] The record also shows that the Commission adopted the proposed changes to LD8 in part to advance neutral districting principles. The changes preserved the core of benchmark LD23, which had elected several Hispanic candidates of choice during the previous decade. J.S. App. 33a; Supp. App. 39. The changes also protected a community of interest by uniting Arizona's copper corridor communities. Supp. App. 14-15.

[19] Arizona Secretary of State, State of Arizona Official Canvass (Dec. 1, 2014), http://apps.azsos.gov/election/2012/General/Canvass2012GE.pdf. The Republican candidate for president in 2012 won 53.1% of statewide votes. *Id.*

election, the Republican Party again won 60% of House seats and 57% of Senate seats.[20]

III. Procedural History.

Appellants are Arizona voters. According to 2010 census data, they reside in state legislative districts that were overpopulated in the Commission's final map. Appellants contend the Commission intentionally overpopulated their districts for impermissible partisan purposes. Harris Br. 2.

Appellants' claims were tried before a three-judge panel convened in the District of Arizona. The panel held a five-day trial and received testimony from nine witnesses, including all five members of the Commission. J.S. App. 8a. The panel also received hundreds of trial exhibits, which it reviewed in conjunction with transcripts of the Commission's public hearings. *Id.*

After making meticulous findings of fact based on the testimony and evidence received at trial and information contained in the public record, a 2-1 majority of the district court concluded that minor population deviations in the Commission's final state legislative map resulted predominantly from the Commission's legitimate consideration of two rational state interests: securing preclearance and accomplishing neutral districting goals. J.S. App. 24a. Although Judge Clifton found that partisanship *may*

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[20] Arizona Secretary of State, State of Arizona Official Canvass (Dec. 1, 2014), http://apps.azsos.gov/election/2014/General/Canvass2014GE.pdf.

have played a role in the creation of ability-to-elect districts, and played some role in alterations to LD8, he and Judge Silver agreed that minor population deviations in the Commission's final map were predominantly motivated by legitimate non-partisan considerations. J.S. App. 36a, 63a n.10.[21] Judges Clifton and Silver further held that this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), did not invalidate voting lines drawn in part to achieve preclearance pursuant to Section 5 of the Voting Rights Act. J.S. App. 69a-72a. Accordingly, the majority held that Appellants failed to establish their equal protection claim. J.S. App. 81a.

Judge Silver concurred in the result, but wrote separately to set forth her views, including her finding that there was no evidence of partisanship in the Commission's final map. J.S. App. 96a-104a. Judge Silver further noted that allegations of partisan bias likely could not supply a cognizable basis for

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[21] The court below divided on Appellants' burden of proof. Judge Silver concluded that Appellants were required to show that minor population deviations resulted solely from illegitimate considerations. J.S. App. 94a. Judge Clifton concluded that Appellants were required to show that illegitimate reasons for population deviations predominated over legitimate ones. J.S. App. 63a n.10. Judge Wake concluded that Appellants were required to show that legitimate purposes could not account for the entirety of each deviation. J.S. App. 139a. Because Judge Silver found no evidence that the Commission acted with improper partisan intent, J.S. App. 96a-104a, she necessarily agreed that Appellants failed to satisfy the predominance test and the majority found it unnecessary to resolve the issue of Appellants' burden. J.S. App. 63a n.10.

Appellants' one-person, one-vote claim. J.S. App. 88a-93a.

Judge Wake dissented from the judgment of the Court. He concluded that the Commission's desire to obtain preclearance was not a legitimate state interest, both before *Shelby County* and because of it. J.S. App. 125a; 129a. He also concluded that minor population deviations in the Commission's final state legislative map were motivated by partisanship, J.S. App. 119a-121a; that partisanship is not a traditional districting criteria sufficient to justify population deviations under this Court's one-person, one-vote doctrine, J.S. App. 117a-118a; and that Appellants had established an equal protection violation, J.S. App. 109a.

This appeal followed. On June 30, 2015, this Court noted probable jurisdiction over the three questions presented in Appellants' Jurisdictional Statement. On July 2, 2015, this Court limited briefing to questions one and two.

SUMMARY OF ARGUMENT

Appellants brought a one-person, one-vote challenge to Arizona's 2010 state legislative map, alleging that the map's minor deviations from perfect population equality resulted from the Commission's pro-Democratic partisanship. The district court rejected that claim and found as fact that the deviations resulted primarily from the Commission's good-faith efforts to obtain Section 5 preclearance and comply with other neutral state redistricting objectives. This Court should affirm. The district court's judgment follows ineluctably from half a century of this Court's

precedent and from factual findings that Appellants do not—and cannot—challenge as clear error.

I.A. The minor population deviations here—an average of 2.2% and a maximum of 8.8%—do not implicate the Equal Protection Clause. For state legislative districts, the one-person, one-vote principle requires "substantial" equality, not perfect equality. *Reynolds*, 377 U.S. at 579. Accordingly, this Court has long held that "under-10% deviations" in such districts are *de minimis* and generally do not require justification by the state. *Connor*, 431 U.S. at 418. Indeed, just last Term, this Court reaffirmed that deviations of plus or minus 5% are "generally permissible." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015) ("*ALBC*") (noting that map attempting to achieve smaller deviations was applying "a more rigorous . . . standard than [the Court's] precedents have found necessary under the Constitution"). That rule protects a core sovereign function of states against endless superintendence by federal courts. It properly recognizes that a narrow focus on perfect equality would "submerge" other goals that states may legitimately pursue in crafting representation in state legislatures, such as keeping political subdivisions intact and preserving communities of interest. *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). Given these pervasive state interests, the Court has held that the Equal Protection Clause is not concerned with minor deviations that could easily result from measurement errors or population changes over decade-long redistricting

cycles. *See id.* at 745-46, 749. This appeal can and should end there.

B. Appellants' only response is to point to the summary affirmance in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (*per curiam*), *summarily aff'd*, 542 U.S. 947 (2004), but that decision did not alter the half century of precedent just described. This Court routinely cautions that such affirmances "should not be understood as breaking new ground." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). And that rule should apply with special force here. The district court's judgment in *Larios* turned on its finding that the legislature intentionally abused the 10% rule to maximize population deviations throughout the state for partisan gain and did not pursue equality in good faith. 300 F. Supp. 2d at 1352. There is nothing even approaching such a finding here, so *Larios* is entirely inapposite. Moreover, this Court's subsequent decision in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), confirmed that *Larios* did not alter the controlling rule about when there is a need for justification of *de minimis* population deviations. *Id.* at 422-23.

II.A. To the extent justification for the *de minimis* variations here was even required, the district court found after a full trial that the Commission's redistricting decisions were predominantly motivated by the desire to comply with Section 5, to obtain preclearance from the Justice Department, and to implement the state constitution's districting criteria. J.S. App. 24a, 36a. That finding is reviewable here only for clear error, and the standard is especially

deferential because the district court's conclusion turned in part on witness credibility. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). Although Appellants rely relentlessly on innuendo about partisanship and race, they do not even attempt to show that the district court's rejection of their allegations was clear error.

B. A desire to obtain Section 5 preclearance is plainly a "legitimate consideration[] incident to the effectuation of a rational state policy"—all that is required to justify minor population deviations like those here. *Reynolds*, 377 U.S. at 579. This Court has held that any number of "substantial and legitimate state concerns" can satisfy this standard. *Brown v. Thomson*, 462 U.S. 835, 843 (1983). The traditional districting principles recognized by this Court include "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation." *ALBC*, 135 S. Ct. at 1270 (internal quotation marks omitted); *see Brown*, 462 U.S. at 842.

Arizona's interest in obtaining Section 5 preclearance is at least as weighty as those this Court has endorsed. When Arizona prioritized preclearance, it simultaneously complied with federal law and vindicated the state's sovereign authority over its elections by keeping the people's representatives, not federal courts, in control. That choice was both "legitimate" and "rational." *Reynolds*, 377 U.S. at 579. Indeed, eight Justices have found that Section 5 compliance is a *compelling* interest, and so necessarily a rational one. *See generally LULAC*, 548 U.S. 399. It

is nonsensical to assert, as Appellants do, that Arizona's map would be unobjectionable had it been drawn *only* to (for example) preserve municipal lines, but that it is subject to invalidation because the Commission also pursued Section 5 preclearance.

C. This Court's decision in *Shelby County* does not require the invalidation of all redistricting plans drawn to comply with Section 5. That decision overturned the coverage formula because the Court found it imposed unjustified burdens on the "residual sovereignty of the States" over their elections by subjecting states to federal oversight. 133 S. Ct. at 2623 (quotation marks omitted). It would be perverse indeed to hold that *Shelby County* then licensed federal courts to invalidate every map—for every state, city, county, board of education, and so on—that was drawn to comply with Section 5. It is for Arizona, not Appellants or the courts, to decide whether and how the state should redraw its legislative maps in light of *Shelby County*.

III.A. The Court need not and should not address Appellants' other question presented. That question rests on a factual premise—that the population deviations here resulted from the Commission's "desire to gain partisan advantage"—that the district court rejected after a year of reviewing the evidence and hearing testimony presented at trial. Appellants do not challenge the district court's fact-finding as clearly erroneous, and it plainly is not. There is no reason for the Court to weigh in on Appellants' counterfactual question presented.

B. If the Court reaches this issue, it should reject Appellants' position. Federal courts need not invalidate every map in which partisan considerations may have played some role in increasing population deviations. As this Court has recognized, partisan considerations are just as pervasive in state legislative redistricting as are departures from perfect equality. *See Gaffney*, 412 U.S. at 752 ("It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary."). Indeed, this Court has recognized "political affiliation" as a "traditional" districting criterion. *ALBC*, 135 S. Ct. at 1270. This precedent cannot be squared with Appellants' position, which would require states *either* to draw maps with perfect population equality (despite the Court's recognition that such perfection is not required for state legislative districts), *or* to undertake the impossible task of banishing politics from districting (lest any deviation, however trivial, be found to have resulted from politics). The Court should not endorse the sea change in doctrine that Appellants seek.

ARGUMENT

I. The Population Deviations At Issue Fall Well Within Those The Court Has Held Are Generally Permissible And Do Not Require Justification Under The Equal Protection Clause.

The district court correctly found that the Commission did not violate the Equal Protection Clause when it adopted a state legislative redistricting

plan that contained minor population deviations. This Court has repeatedly held that maximum population deviations of less than 10% are *de minimis* and do not require justification by the state. This rule has been applied with near uniformity by this Court and lower courts for over fifty years. Appellants' argument would undermine decades of consistent precedent and create an incoherent rule subjecting nearly every state's legislative apportionment plan to increased constitutional scrutiny and fact-intensive oversight by federal courts.

A. This Court Has Never Held That A State Must Justify Population Deviations Of Less Than 10% In A State Legislative Redistricting Plan.

The Equal Protection Clause's requirement that state legislative districts "be apportioned on a population basis" demands "substantial" population equality, not perfect equality. *Reynolds*, 377 U.S. at 576, 579. Although a state must "make an honest and good faith effort" to construct state legislative districts "as nearly of equal population as is practicable," the Court's jurisprudence has long recognized that "[m]athematical exactness or precision is hardly a workable constitutional requirement." *Id.* at 577. This standard reflects the Court's conscious decision to afford states "broader latitude" in drawing their own legislative districts than exists in congressional

districting. *Mahan v. Howell*, 410 U.S. 315, 321-22 (1973).[22]

Population deviations under 10% in legislative district plans are considered *de minimis* population variances that generally do not require state justification. *Connor*, 431 U.S. at 418. Indeed, just last Term, this Court reaffirmed five decades of consistent precedent holding that deviations of plus or minus 5% are "generally permissible" and that a state plan that intentionally set out to achieve a maximum deviation of no more than 2% was striving to achieve a "more rigorous . . . standard than [the Court's] precedents have found necessary under the Constitution." *ALBC*, 135 S. Ct. at 1263 (citation omitted).

This is because the Court does "not consider relatively minor population deviations among state

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[22] Unlike deviations in state legislative districts, population deviations among congressional districts generally do require justification. In *Karcher v. Daggett*, this Court held that if a plaintiff can show there are deviations among congressional districts that "could practicably be avoided," 462 U.S. 725, 734 (1983), then the state must "show with some specificity" that the population differences "were necessary to achieve some legitimate state objective." *Id.* at 740. This burden is a "flexible" one, which "depend[s] on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.* at 741. However, even as to congressional districts, this Court has recently cautioned lower courts on the need "to afford appropriate deference to [a state's] reasonable exercise of its political judgment" in districting. *Tennant v. Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 5 (2012) (*per curiam*).

legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation." *White v. Regester*, 412 U.S. 755, 764 (1973); *see also Gaffney*, 412 U.S. at 749 ("We doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature."). As the Court in *Brown v. Thompson* summarized:

> [W]e have held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.

462 U.S. at 842-43 (quoting *Gaffney*, 412 U.S. at 745); *see also Voinovich v. Quilter*, 507 U.S. 146, 160-62 (1993); *ALBC*, 135 S. Ct. at 1263.

This Court has rejected a more stringent standard of mathematical precision, first, in order to protect the quintessential sovereign functions that states exercise when they draw their own legislative districts. States have long exercised this sovereign discretion to maintain the integrity of subdivisions, to preserve the

cores of prior districts, and to pursue myriad other interests—all of which is ill-suited to superintendence by the federal judiciary.[23] *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Mahan*, 410 U.S. at 324-25; *Reynolds*, 377 U.S. at 586. State apportionment decisions are often made mindful of factors other than eliminating "insignificant population variances," and "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations." *Gaffney*, 412 U.S. at 748-49. For this reason, courts must avoid "becom[ing] bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." *Id.* at 750.

Second, this Court's standard recognizes that mathematical exactitude is "a practical impossibility." *Reynolds*, 377 U.S. at 577. Ideal population figures are based on census population data, which is a snapshot in time of the number of persons in a given district, and which fluctuates during the decade-long cycle throughout which the districts typically exist. *See Reynolds*, 377 U.S. at 583 (finding this "prescribed practice" of reapportioning districts every ten years a "rational approach" that is constitutionally sufficient); *LULAC*, 548 U.S. at 421 (noting that "[s]tates operate under the legal fiction that their plans are

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[23] As this Court held last term, the Commission holds the state's sovereign authority to reapportion state legislative districts. *AIRC*, 135 S. Ct. at 2659, 2677. Appellants' argument that the "principle of deference to sovereign state legislatures does not apply" to the Commission, Harris Br. 56, is in direct contravention of that decision.

constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant redistricting"). Thus, "[i]t makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted. The 'population' of a legislative district is just not that knowable to be used for such refined judgments." *Gaffney*, 412 U.S. at 745-46. Any other conclusion would require continuous redistricting and prove unworkable for both states and the courts.

The resulting rule is clear and easily applied. As a matter of course, both this Court and lower courts throughout the country have upheld state legislative apportionment plans with deviations of less than 10%, finding that such *de mimimis* deviations do not implicate equal protection concerns. *See, e.g., Gaffney*, 412 U.S. at 751, 754 (upholding state legislative plan with 8% maximum population deviation); *White*, 412 U.S. at 761 (same with 9.9% deviation); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365, 371 (S.D.N.Y. 2004) (same with 9.78% deviation), *summarily aff'd*, 543 U.S. 997 (2004); *Cecere v. Cnty. of Nassau*, 274 F. Supp. 2d 308, 311 (E.D.N.Y. 2003) (same with 8.94% deviation); *see also Connor*, 431 U.S. at 418; *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1031 (D. Md. 1994) (holding that "there is no burden on the State to justify [a] deviation" of less than 10%).[24]

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[24] Appellants misleadingly note that in *Chapman v. Meier*, 420 U.S. 1, 25-26 (1975), this Court stated that a population deviation of 5.95% may not "necessarily . . . be permissible." *See* Harris Br. 51-52. Nothing about the dicta in that case—in which the Court

But see Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) *(per curiam)*, *summarily aff'd*, 542 U.S. 947 (2004). Consistent with this long line of precedents, the 8.8% maximum population in the Commission's apportionment plan is a *de minimis* deviation that is "insufficient . . . to require justification by the State." *Brown*, 462 U.S. at 842-43 (quotation marks omitted).

B. This Court's Summary Affirmance In *Larios v. Cox* Did Not Change The Law That The Deviations At Issue Here Do Not Require Justification.

Appellants generally ignore this Court's five decades of precedent allowing minor population deviations such as those at issue here. Appellants focus instead on the summary affirmance of the district court's decision in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) *(per curiam)*, *summarily aff'd*, 542 U.S. 947 (2004), the lone case overturning a state legislative apportionment plan with less than a 10% population deviation. The Court's summary affirmance in *Larios* does not change the law.

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struck down a court-ordered reapportionment plan with a maximum deviation of over 20%—alters the general rule that under-10% deviations in state legislative reapportionment plans drawn by the state entity authorized to conduct redistricting are presumptively constitutionally valid. *See Chapman*, 420 U.S. at 22; *see also Connor*, 431 U.S. at 414 (court-ordered apportionment plans are held to a stricter standard than legislatively drawn plans); *AIRC*, 135 S. Ct. at 2673 (Arizona's independent redistricting commission is equivalent to a state legislative body for reapportionment purposes).

As an initial matter, this Court does not make new law in a summary affirmance like *Larios*. "A summary affirmance is not to be read as a renunciation by this Court of doctrines previously announced in [the Court's] opinions after full argument." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1800-01 (2015) (internal quotation marks omitted) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, CJ., concurring)). "Summary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel*, 432 U.S. at 176. Accordingly, a summary affirmance has "considerably less precedential value than an opinion on the merits." *Wynne*, 135 S. Ct. at 1800 (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979)).

Moreover, the *Larios* summary affirmance has no relevance here given the chasm between that case and this one. In *Larios*, the district court found that the legislature intentionally abused the 10% rule to maximize statewide population deviations for partisan gain. *See* 300 F. Supp. 2d at 1352. Unlike the Commission here, the Georgia state legislature in *Larios* did not make any good-faith effort to equalize population. Instead, the legislators "pushed the deviation as close to the 10% line as they thought they could get away with." *Id.* They did so to promote regionalism, protect incumbents of one party, and pit incumbents of the other party against one another. *Id.* And the creators of the Georgia state plans in *Larios*—again, unlike the commissioners here—"did not

consider such traditional redistricting criteria as district compactness, contiguity, protecting communities of interest, and keeping counties intact." *Id.* at 1325. "Rather, they had two expressly enumerated objectives: the protection of rural Georgia and inner-city Atlanta against a relative decline in their populations compared with that of the rest of the state and the protection of Democratic incumbents." *Id.* This case is nothing like *Larios*, and Appellants' attempt to extract a novel legal rule from the Court's summary affirmance should be rejected.

This Court's subsequent decision in *LULAC* confirms that *Larios* does not have the broad significance Appellants attribute to it. *LULAC* reaffirmed, first, that a state's justification for a population disparity becomes relevant only *after* plaintiffs have established a *prima facie* equal protection violation and, second, that the deviation alone is not sufficient to establish such a violation:

> Because appellants have not demonstrated that the legislature's decision to enact Plan 1374C constitutes a violation of the equal-population requirement, we find unavailing their subsidiary reliance on *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (*per curiam*), *summarily aff'd*, 542 U.S. 947 (2004).... The *Larios* holding and its examination of the legislature's motivations were relevant *only in response* to an equal-population violation, something appellants have not established here.

548 U.S. at 422-23 (emphasis added). Thus, to the extent that any principle can be drawn from *Larios*,

LULAC clarified that, at most, *Larios* can be read to require state justification of population deviations under 10% when the plaintiff has already shown a *prima facie* equal protection violation based on factors other than the deviation itself. Appellants have not done so here, and *Larios* does not stand for the proposition that population deviations of less than 10% will always require state justification.

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Appellants failed to establish a *prima facie* equal protection violation that would require justification by the Commission. The small population variations here are well within what this Court has deemed generally permissible, and Appellants produced nothing *other* than the variations themselves that could demonstrate a *prima facie* violation. *See infra* Part III. Indeed, Appellants explicitly rely on the deviations alone as their proposed "trigger for this Court's scrutiny." Harris Br. 55. The Court can and should affirm on this basis alone.

II. Even Assuming That Justification Was Required, The Trial Court Correctly Found That The Population Deviations Were Justified.

Even if the *de minimis* population deviations in Arizona's state legislative maps require explanation, the court below correctly found that the deviations were justified by the Commission's desire to achieve preclearance and adhere to Arizona's constitutionally prescribed redistricting criteria. This Court's precedent confirms that those interests are more than

sufficient to serve as "legitimate considerations incident to the effectuation of a rational state policy," *Reynolds*, 377 U.S. at 579, which is all that is required.

A. The Trial Court Correctly Found That The Reason For The Minor Deviations Was The Commission's Desire To Achieve Preclearance And Adhere To Traditional Districting Criteria.

The court below found that the Commission's redistricting decisions were predominantly motivated by the desire to comply with Section 5 of the Voting Rights Act, to obtain preclearance from the Justice Department, and to implement the state constitution's redistricting criteria. J.S. App. 24a, 36a. This factual finding is entitled to deference and reviewed only for clear error. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 744 (1983); *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982). Accordingly, it must be upheld so long as it "falls within [the] broad range" of conclusions permitted by the record developed at trial. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990).

This standard reflects an obvious truth: that district courts enjoy greater proximity to the testimony and evidence probative of intent. The district court's unique vantage point is particularly critical where, as here, factual findings turn in part on the credibility of witnesses. *Anderson*, 470 U.S. at 575 ("[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that

finding, if not internally inconsistent, can virtually never be clear error.").

The court below presided over five days of trial. J.S. App. 8a. It heard live testimony from all five commissioners and the parties' experts. J.S. App. 8a, 74a; Trial Tr. 925-1025. It also reviewed deposition testimony from the Justice Department attorney involved in the review and rejection of the Commission's 2002 state legislative map, J.S. App. 25a; Trial Tr. 692:2-5, as well as the special master appointed to revise that map. Trial Tr. 925-1025; 926:20-23. The panel questioned witnesses and counsel at length. *See, e.g.*, Trial Tr. 1177-1263. It scrutinized the Commission's grid, draft, and final state legislative maps, as well as the population statistics and other statistical information for each district in each map. And it reviewed transcripts of the Commission's public hearings. *See* J.S. App. 8a. Put simply, the court below was very well positioned to make nuanced factual judgments about the Commission's intent.

Following its exhaustive review, the majority below found that population deviations in the Commission's final map resulted from the Commission's good-faith pursuit of legitimate redistricting goals. J.S. App. 24a, 36a. With respect to compliance with Section 5, the court found that the Commission's efforts to avoid retrogression were not a pretext for partisan vote dilution. J.S. App. 36a. The court also found that all commissioners believed that to achieve preclearance, they needed to create and subsequently strengthen ten ability-to-elect districts. J.S. App. 39a-40a. The conclusion that the Commission was at all times acting

in good faith finds further support in the Commission's consistent efforts to mitigate the already minor population deviations that resulted from its attempts to balance non-retrogression and traditional districting goals. *See, e.g.*, Supp. App. 34-35; 41-47.

Nowhere in their briefs do either Appellants or the Secretary contend that the trial court's factual findings about the Commission's intent are clearly erroneous. Both parties ignore the trial court's finding that *de minimis* departures from perfect population equality resulted incidentally from the Commission's honest pursuit of legitimate state interests. And both attempt to relitigate this case on appeal, making naked assertions about partisan or racial motivations without citing the record to support their claims. *See, e.g.*, Harris Br. 21; Secretary's Br. at 20. This, of course, is impermissible. *See Teva Pharmas. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015); *Anderson*, 470 U.S. at 573-74; *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 123 (1969).[25]

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[25] In their attempt to relitigate this case, Appellants try to convince this Court that the Justice Department would have granted preclearance even if the Commission created only seven ability-to-elect districts. Harris Br. 45. But as the court below found, there is no evidence supporting that proposition. J.S. App. 73a-75a. To the contrary, the court determined that the Commission's decision to try to achieve ten ability-to-elect districts was appropriate in light of Arizona's unique historical and political circumstances, including past failures to obtain preclearance and the state's constitutionally expressed preference for voting under maps designed by the Commission. J.S. App. 23a-25a, 75a-76a. Because the trial court's finding reflects its familiarity with Arizona's unique history and its appraisal of

B. A Desire To Achieve Preclearance And Comply With Section 5 Is A Legitimate State Interest Incident To The Effectuation Of A Rational State Policy.

Appellants claim that the Commission's desire to obtain preclearance cannot justify the creation of legislative districts with even minor deviations from perfect population equality. Harris Br. 42. But the Commission's desire to obtain preclearance under Section 5 is plainly a "legitimate consideration[] incident to the effectuation of a rational state policy" that justifies such deviations. *Reynolds*, 377 U.S. at 579. Obtaining preclearance was required under state and federal law, and ensured that the map used on election day was drawn by those exercising the people's delegated authority, *AIRC*, 135 S. Ct. at 2671, not by a federal court.

1. The Desire To Achieve Section 5 Preclearance Is A Sufficient Interest To Justify Minor Population Variations.

Out of respect for state sovereignty, this Court has crafted a standard that is intentionally forgiving of minor population variations in state legislative districts. So long as the variation resulted from action taken "in good faith" and "based on legitimate considerations incident to the effectuation of a rational state policy," *Reynolds*, 377 U.S. at 579, the one-person, one-vote guarantee is met. This standard (once again)

Arizona's local needs, it is especially worthy of deference. *See, e.g.*, *Rogers*, 458 U.S. at 622 (quoting *White*, 412 U.S. at 769-770).

recognizes the greater "flexibility" and "broader latitude [that] has been afforded the States" in this realm. *Mahan*, 410 U.S. at 321-22. Consistent with the standard's relative leniency, this Court has held that any number of "substantial and legitimate state concerns" can satisfy this standard. *Brown*, 462 U.S. at 843. The traditional districting principles recognized by this Court include "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation." *ALBC*, 135 S. Ct. at 1270 (internal quotation marks omitted); *see Brown*, 462 U.S. at 842. These interests are hardly compelling, but they indisputably clear the modest hurdle that applies. *Cf. Mahan*, 410 U.S. at 326 (the "proper . . . test is not framed in terms of 'governmental necessity,' but instead in terms of a claim that a State may 'rationally consider'" (citation omitted)).

At bottom, Appellants' position is that the Voting Rights Act provides *less* justification for minor population variances than the interests just enumerated. That is, a state whose map departs from perfect population equality to follow county lines may overcome a one-person, one-vote challenge, but—Appellants contend—avoiding retrogression and obtaining preclearance under the Voting Rights Act cannot justify even the slightest variation. *See* Harris Br. 55.

This Court's opinions, however, leave no doubt that Arizona's interest in avoiding retrogression and achieving preclearance is at least as weighty. Eight Justices have endorsed the conclusion that compliance

with Section 5 is a *compelling* state interest, and thus necessarily a rational one. *LULAC*, 548 U.S. at 518 (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.); *id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.). And, this Court has repeatedly assumed the same thing for the Voting Rights Act more generally. *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion). It completely undermines all of this precedent to argue, as Appellants do, that achieving preclearance is not even a "legitimate" or "rational" state interest. *Reynolds*, 377 U.S. at 579.

Precedent aside, the Commission's decision to prioritize preclearance simultaneously furthered multiple state interests, each of which is at least "legitimate" and "rational." *Id.* Federal law required Arizona to obtain preclearance by demonstrating lack of retrogression. *Reno v. Bossier Parish School Board*, 520 U.S. 471, 478 (1997). Arizona's constitution reinforced the same obligation. Ariz. Const. art. IV, pt. 2, § 1(14)(A). Moreover, prioritizing preclearance furthered Arizona's sovereign authority over its elections. Had the Commission's plan been denied preclearance, it was exceedingly likely that a federal court would ultimately have drawn Arizona's legislative map, as occurred in the last redistricting cycle, at increased cost to Arizona's taxpayers. *See Navajo Nation v. Ariz. Indep. Redistricting Comm'n*,

230 F. Supp. 2d 998 (D. Ariz. 2002). A denial also would have reset the ten-year bail-out clock for Section 5's preclearance requirements. 52 U.S.C. § 10303(a)(l)(E). By contrast, emphasizing first-try preclearance kept the state's sovereign redistricting authority in the hands of the body the people of Arizona designated to draw the state's maps.

The Commission's decision to prioritize preclearance was legitimate, rational, and designed to realize a principle this Court has cogently stated time and again—that the "primarily ... political and legislative process" of reapportionment is properly kept with "those organs of state government selected" by the people, not "performed by federal courts." *Gaffney*, 412 U.S. at 749, 751; *see Connor*, 431 U.S. at 415 ("The federal courts ... possess no ... mandate to compromise sometimes conflicting state apportionment policies in the people's name.").[26]

2. The Contrary Arguments of Appellants And The Secretary Fail.

Appellants and the Secretary base their principal counterargument on a red herring. Appellants argue

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[26] This case is thus very different from *Alabama Legislative Black Caucus*, where the state operated under a fundamental misapprehension of what was required under Section 5 in believing that "it was required to maintain roughly the same black population percentage in existing majority-minority districts." *ALBC*, 135 S. Ct. at 1263; *see id.* at 1272-74 (explaining that the state's view was inconsistent with "what [the] Department of Justice Guidelines say" and with "§ 5's language [and] purpose"). Here, the Commission's approach accorded with that of the Justice Department and Section 5 itself.

that the "Voting Right Act d[id] not 'require ... population inequality in legislative districting,'" and, if it had, it would have been invalid as "contrary to the Constitution's guarantee of equal protection." Harris Br. 43-44 (quoting J.S. App. 131a); *see also* Secretary's Br. 39. Of course the Voting Rights Act did not *require* population inequality. The Voting Rights Act did, however, require Arizona to seek preclearance by demonstrating non-retrogression. *Bossier*, 520 U.S. at 478. That requirement is what drove the Commission's choice to draw ten ability-to-elect districts, minor population variations notwithstanding. The Commission's interest in achieving preclearance does not become less "legitimate" or "rational," *Reynolds*, 377 U.S. at 579, just because the Act leaves to states the specific means for showing non-retrogression, nor just because minor population deviations result in part from the attempt to achieve non-retrogression.

Appellants appear to contend that if the Commission had instead submitted a map that did not have ten ability-to-elect districts, the Justice Department would have been bound to preclear it if a plan with ten ability-to-elect districts would have required modestly larger population variation. Harris Br. 43. Put another way, Appellants seem to suggest that the Constitution would have required the Department to accept a retrogressive map if that was the only way to achieve perfect population equality. *See id.* But the one-person, one-vote principle did not require Arizona to skate as close to the edge as possible, risking denial of preclearance just for the sake of eliminating minor population variations that were

well within the *de minimis* variations regularly upheld by this Court.[27] The Justice Department's guidance reflects this settled precedent and flatly contradicts Appellants' view: It says that for "state legislative and local redistricting," the Department will not consider as "a reasonable alternative," a plan with "*significantly* greater overall population deviations." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011) (emphasis added).

As for Appellants' claim that interpretations other than their own would yield a constitutional violation, Harris Br. 44, it too rests on an incorrect premise: that the Constitution requires perfect equality in state legislative redistricting. If the Equal Protection Clause condemns minor variations in state legislative district populations at all, it does so only when variations are not "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579. The Voting Rights Act is no more constitutionally suspect under this rule than, say, a state statute that requires adherence to county lines when minor population variations may result. *See, e.g.*, *Mahan* 410 U.S. at 319, 328 (approving Virginia map

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[27] This Court's racial gerrymandering cases are not to the contrary. *See* Harris Br. 49. In that context, the Court has held that when a state uses "racial classifications" to draw district lines, it does not have "a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Miller*, 515 U.S. at 922. Rather, the Court will independently scrutinize whether race-based remedies are necessary. *Id.* As Appellants conceded below, "this is not a racial gerrymandering case" and strict scrutiny does not apply. J.S. App. 64a.

with 16.4% variation based on "policy of respecting the boundaries of political subdivisions"); *Brown*, 462 U.S. at 843-44 (approving Wyoming's use of district with 60% deviation because of state's "constitutional policy . . . of using counties as representative districts and ensuring that each county has one representative").[28]

In contrast to Appellants, the Secretary acknowledges that preserving a minority group's ability to elect its preferred candidate can sometimes justify "deviat[ions] from the ideal population." Secretary's Br. 38 & n.18. The Secretary claims, however, that what the Commission did was nonetheless impermissible because it supposedly entailed *intentional* under-population, whereas "[e]quality must be the goal." Secretary's Br. 28. But as the Secretary appears to recognize, this attractive-sounding platitude is inconsistent with this Court's precedent. When a state prioritizes adhering to municipal lines or maintaining the cores of prior districts, rather than population equality, the state is *also* intentionally choosing larger population

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[28] For the same reason, Appellants miss the mark with their reliance on provisions of the Arizona constitution and Justice Department guidance that reaffirm adherence to the one-person, one-vote standard. Harris Br. 34-36; *see* Ariz. Const. art. IV, pt. 2, § 1(14)(B) ("State legislative districts shall have equal population to the extent practicable."); 76 Fed. Reg. at 7472 ("Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle."). These provisions track the federal constitutional standard in condemning only violations that are larger than those here and not "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579.

variances—yet, this Court has protected the states' ability to make these sovereign choices when variations are small. *See, e.g., Gaffney*, 412 U.S. at 749; *Mahan* 410 U.S. at 319, 328; *cf. Tennant v. Jefferson County Commission*, 133 S. Ct. 3, 8 (2012) (endorsing state's decision to permit larger variations in congressional plan because no alternative plan "came close to vindicating all . . . of the State's legitimate objectives . . . as well").

Undeterred, the Secretary insists that these Court-approved choices are distinguishable because they are made "in spite of" their "adverse effects" on population equality, whereas the Commission allegedly acted "because of" an impermissible intent to manipulate "the relative weight of . . . votes." Secretary's Br. 27, 43 n.20. The main problem with the Secretary's attempt to distinguish this Court's precedent is that this case falls on the wrong side of the line the Secretary draws. Let there be no mistake: The Commission did not act—and the district court certainly did not *find* that the Commission acted—with the purpose of affecting the relative weight of votes. Instead, the district court's finding, not properly challenged here, was that the Commission's purpose was (primarily) to obtain first-try preclearance and to avoid possible retrogression by drawing ten ability-to-elect districts. J.S. App. 23a-24a, 38a-39a.[29]

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[29] Appellants argue that even if the Commission's approach was generally permissible, it was inappropriate on the facts either because there were only seven "benchmark" ability-to-elect districts, Harris Br. 41, or because three of the Commission's asserted ability-to-elect districts did not actually qualify, Harris

To achieve this goal, the Commission shifted populations into and out of ability-to-elect districts. But the decisions to move population for the purpose of strengthening ability-to-elect districts in no way suggest the Commission intended to dilute votes. J.S. App. 30a-31a. Using under-population "as a tool" involves nothing more sinister than attempting to avoid retrogression. Secretary's Br. 39. And while the Commission would have known that the steps it took to strengthen ability-to-elect districts would affect population balances among the districts, Secretary's Br. 27, that is no different from a state following county lines with knowledge that doing so will affect population balances. *Id.*

Indeed, while the Secretary pretends that a bright line separates these districting decisions, the record here shows that they often merge in practice. For example, the Commission found that it could solidify LD4 as an ability-to-elect district *either* by splitting boundaries *or* by modestly reducing the district's population. Supp. App. 24-26. There is no reason the Commission was or should be required to choose the first option just because Section 5 preclearance was in play. *See Gaffney*, 412 U.S. at 748-49.

At bottom, there is no constitutionally significant difference between the Commission's choices and those

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Br. 45. The district court, however, found that the challengers had not provided "a basis to independently determine" the number of ability-to-elect districts and that they had "not carried their burden." J.S. App. 73a-74a. Appellants have not properly challenged that factual finding and there are no grounds for this Court to revisit it.

this Court has expressly approved. Indeed, the decisions line-drawers make to comply with federal law are informed and even constrained by the pursuit of other districting principles. The Secretary makes much of the requirement that states make "'an honest and good faith effort' at equal districts," Secretary's Br. 37 (quoting *Reynolds*, 377 U.S. at 577), but that command has always been limited to what is "practicable" in light of the "flexibility" that states have under this Court's precedent to pursue other legitimate redistricting interests—of which achieving preclearance is one. *Reynolds*, 377 U.S. at 577-78. Indeed, the Secretary's argument is particularly misguided here, where the evidence shows that the Commission went out of its way to *reduce* population variations before finalizing the map. Supp. App. 41-47. The Commission's choices fully complied with its obligations under the one-person, one-vote principle.[30]

In closing, the Secretary attempts to inject into this case a veiled racial gerrymandering claim, accusing the Commission of giving overriding weight to "racial and

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[30] The Secretary invokes *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 58 (1970), but that decision only underscores that this case does not involve the intentional discrimination that this Court has condemned. *Hadley* invalidated a Missouri statute that "automatically discriminate[d]" against voters in large school districts by providing that they would never receive representation proportional to their population. *Id.* Here, no identifiable set of districts received any automatic preference. The Commission considered factors relevant to Section 5 preclearance alongside the "[s]everal factors," *Reynolds*, 377 U.S. at 580, that states consider in the multifaceted process of reapportionment.

ethnic considerations" and seeking to create a "preferred class" of minority districts. Secretary's Br. 39, 43. But, again, the Court should not be fooled: The Commission did not make any illegitimate use of race, and the district court's factual findings do not support the Secretary's invented accusation. Rather, as explained, the Commission's focus was Section 5 preclearance (among other legitimate redistricting goals). *See supra* at 7-12. To achieve that goal, the Commission did exactly what this Court has instructed redistricting bodies to do—conducted a functional analysis using multiple factors to determine what was required to achieve minority ability-to-elect districts. *ALBC*, 135 S. Ct. at 1272-73. If the Secretary believed that the Commission had impermissibly let "race predominate[] over other redistricting criteria," Secretary's Br. 46, she had every chance to bring a racial gerrymandering claim. But she did not, and the challengers specifically *conceded* that "this is not a racial gerrymandering case." J.S. App. 64a. Given that, the Court should not be distracted by the Secretary's use of unsupported race-based innuendo.

C. *Shelby County* Does Not Call For The Invalidation Of All Redistricting Plans Drawn To Comply With Section 5.

Appellants, but not the Secretary, argue in the alternative that even if the Commission acted legitimately and reasonably when it drew Arizona's map following the 2010 census, this Court's decision in *Shelby County* invalidating the coverage formula in Section 4(b) of the Voting Rights Act somehow requires the map's invalidation now. Appellants claim

this is so because a "court must decide a case consistent with current law" by applying *Shelby County* retroactively, and—Appellants argue—permitting Arizona's current map to stand would "'give continuing force to Section 5 despite the unconstitutionality of applying it anywhere.'" Harris Br. 47 (quoting J.S. App. 125a).

Leaving aside the misstatement that *Shelby County* invalidated Section 5 (rather than the coverage formula in Section 4(b)), Appellants misunderstand how retroactivity works. *Shelby County* indisputably applies retroactively in that the Court will treat it "as a controlling statement of federal law" regarding the application of the coverage formula. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 93 (1993). But *Shelby County*'s controlling statement is irrelevant under the governing substantive law, which at most requires a showing that the map's modest variances resulted from action taken in "good faith" and "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579. Maps that complied with this standard when drawn do not become invalid when facts or law change. Later population shifts and increases do not undermine a map properly drawn based on census data; and, if a state draws districts with population variations so as to avoid a contest between two incumbents, the map remains valid even if one retires. *See id.* at 583; *LULAC*, 548 U.S. at 421; *cf. Oyama v. California*, 332 U.S. 633, 683 n.8 (1948) (rational-basis inquiry looks at the "state of facts at the time the law was enacted" (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78

(1911))). Likewise here, so long as Arizona was required to seek preclearance, the Commission acted legitimately, rationally, and in good faith by working to achieve non-retrogression.[31]

Relying on *Shelby County* to invalidate Arizona's election map would be perverse. That decision overturned the coverage formula because the Court found it imposed unjustified burdens on the "residual sovereignty of the States" over their elections by subjecting them to federal oversight. 133 S. Ct. at 2623 (quotation marks omitted). Here, Arizona—via the Commission—made the choice that prioritizing preclearance best furthered its sovereignty under the governing legal regime by keeping the final decision on its map out of the hands of federal courts. *See supra* at 7-8. But now, Appellants ask this Court to mandate the very interference that Arizona sought to avoid. Nothing in *Shelby County* supports that result. To the contrary, despite Appellants' warnings of giving "continuing force" to a constitutional violation, Harris Br. 47, the only constitutional harm that *Shelby County* identified was one to Arizona's sovereignty—sovereignty that the Commission exercises for the people. *AIRC*, 135 S. Ct. at 2671. It is Arizona, not Appellants or the courts, who should decide whether

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[31] It is not unusual for the substantive standard to turn on the law in force when a government decisionmaker acted. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (qualified immunity); *Illinois v. Krull*, 480 U.S. 340, 348-49 (1987) (search conducted under later-invalidated state statute).

and how the state should redraw its legislative maps in light of *Shelby County*.[32]

III. Appellants Ask This Court To Create A New Constitutional Rule Removing Politics From Redistricting.

Appellants' accusations that the Commission pursued a partisan agenda are also unavailing. First, Appellants rest their argument on a factual premise—that the deviations here resulted primarily from partisanship—that the district court rejected in findings Appellants cannot show are clearly erroneous. *Compare* Harris Br. 28-29, *with* J.S. App. 36a. Second, Appellants' legal position is untenable and irreconcilable with this Court's precedent. Though they disavow that they are bringing a partisan gerrymandering claim, Harris Br. 54, Appellants are essentially asking this Court to hold that a state is required to achieve *perfect* population equality as long as there were *any* partisan considerations involved with the drawing of district lines. Harris Br. 55. The Court should reject Appellants' invitation.

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[32] The district court decisions that Appellants cite do not apply *Shelby County* to invalidate maps lawfully adopted before that decision, as Appellants ask this Court to do. Instead, the defendants in those cases chose not to seek preclearance before *Shelby County*, and the courts applied that decision retroactively to reject claims that the defendants violated Section 5. *See Hall v. Louisiana*, 973 F. Supp. 2d 675, 684 (M.D. La. 2013); *Bird v. Sumter Cnty. Bd. of Educ.*, No. 1:12-CV-76-WLS, 2013 WL 5797653, at *3 (M.D. Ga. Oct. 28, 2013). That is far afield from the situation here.

A. The Trial Court Correctly Found That The Minor Deviations At Issue Were Not Motivated By Partisanship.

Appellants frame their first question presented as whether "the desire to gain partisan advantage for one political party [can] justify creating legislative districts of unequal population that deviate from the one-person, one-vote principle of the Equal Protection Clause?" That question is entirely hypothetical because it is not supported by the record in this case. As described above, the clear finding of the district court, after a full trial, was that the Commission was not trying to "gain partisan advantage for one political party" by creating districts with minor population deviations. Rather, the court found as fact that the population deviations resulted predominantly from the Commission's good-faith efforts to achieve preclearance under the Voting Rights Act. J.S. App. 36a.

The court below spent more than a year reviewing evidence and testimony presented at trial and voluminous public records of Commission proceedings. Based on this comprehensive review, the court determined that population deviations resulted from the Commission's honest pursuit of legitimate districting goals. Nonetheless, Appellants ask this Court to throw out the state's *entire* legislative map based on the lower court's subsidiary finding that, at most, "some of the commissioners were motivated in part in some of the linedrawing decisions by a desire to improve Democratic prospects in the affected districts." J.S. App. 6a; *cf. ALBC*, 135 S. Ct. at 1265 (requiring district-by-district analysis of legislature's

line-drawing decisions); Harris Br. 4. The court's subsidiary finding, however, was exceedingly narrow: that the evidence showed some commissioners entertained some partisan considerations only with respect to LD8. J.S. App. 41a-42a. And even as to that district, the court found that while "partisanship played some role," Appellants had not shown that "partisanship predominated over legitimate factors" in the design of that district. J.S. App. 79a.

Without a single citation to any record evidence of partisan motivation for any line drawn for any other district, Appellants are left with nothing more than a statistical correlation case. Echoing the dissent below, they rest their claim on the fact that most of the underpopulated districts have a plurality of registered Democrats. J.S. App. 120a. But this alone proves nothing. Given the correlation between racial and ethnic identity and party support in Arizona, it is no surprise that districts offering minorities the ability to elect candidates of choice *also* lean Democratic. J.S. App. 37a. In these circumstances, correlation alone does not show that partisan motivations predominated over other motivations (including Section 5 preclearance).

Yet as Appellants (and the dissenting judge below) would have it, they need show nothing other than a statistical correlation between population deviations and party registration in the districts. *See* J.S.A. 108a (dissent asserting that "the statistics of [the Commission's] plan are conclusive"); *id.* 120a (dissent stating that this case concerns "systematic population inequality for party advantage that is not only provable

but entirely obvious as a matter of statistics alone"). This Court has never endorsed the proposition that an equal protection violation can be established by nothing more than statistical correlation. *Cf. Tex. Dep't of Hous. v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015) (cautioning against the "serious constitutional questions that might arise" if "liability were imposed based solely on a showing of a statistical disparity"). That is particularly true when the statistical correlation is based on partisan affiliation. *See Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality opinion) (questioning premise that the "only factor determining voting behavior at all levels is political affiliation").

Moreover, even if the correlation between district population and partisan affiliation were probative, Appellants have no evidence of invidious partisan intent. As Judge Silver pointed out below, *the Commission's map is not biased in favor of Democrats.* J.S. App. 98a. To the contrary, the map's partisan distribution fairly reflects the partisan distribution of registered voters in the state, and even has a slight pro-Republican tilt. *Id.* The map leaves the Republican Party firmly in control of a majority of the seats in Arizona's House and Senate, likely for the rest of the decade. *See id.*; Supp. App. 8-9. Appellants' suggestion that the Commission engaged in a kind of covert partisan gerrymandering, using population deviations to achieve that goal, is thus doubly unfounded.

B. Appellants Ask This Court To Create A New Rule Under Which Any Redistricting Plan With Any Minor Deviation Can Be Challenged On The Ground That It Is Motivated By Partisanship.

Appellants' position boils down to an implausible proposition: if a plaintiff shows any amount of partisan motivation, however small and localized, then any population deviation in a state legislative map renders the map unconstitutional. Harris Br. 54-55. That is not, and should not become, the law.

To be sure, Appellants deny they are making a partisan gerrymandering claim. Harris Br. 54 ("This is not a political gerrymandering case."). But they contend that the presence of *any* partisan motivation during the line-drawing process requires the correction of *any* population deviation. No "deviation from the ideal" can be tolerated, Appellants argue, if the motives for such a minor deviation were tainted in any way by political considerations. Harris Br. 55.

Such a rule cannot be squared with this Court's precedent. The goal cannot be to eradicate *all* partisan considerations from the process whenever populations of districts depart from strict equality. Indeed, this Court has specifically endorsed the use of partisan considerations in redistricting to achieve partisan fairness. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), this Court upheld a state legislative redistricting map with population deviations greater than those at issue here, where it was admitted that "virtually every Senate and House district line was drawn with the

conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U.S. at 752. Far from finding these partisan considerations problematic, this Court instead found that "judicial interest should be at its lowest ebb when a state purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." *Id.* at 754.

With respect to their proposed rule, Appellants draw no distinction between the use of partisanship in a case like *Gaffney*, which concerned a good-faith effort to achieve partisan fairness and balance, and the use of partisanship in a case like *Larios*, which concerned a bad-faith effort to achieve unfair partisan gain. Instead, Appellants seek to banish any consideration of partisanship in districting (despite their disclaimers otherwise). But as Justice Scalia noted in his dissent from the summary affirmance in *Larios*, there is every reason to treat "'politics as usual'" as a traditional and constitutional redistricting criterion, so long as it does not go too far. *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia J., dissenting); *see Vieth*, 541 U.S. at 285-86 (plurality opinion) ("The Constitution clearly contemplates districting by political entities . . . and unsurprisingly that turns out to be root-and-branch a matter of politics."). Just last Term, this Court recognized as much, listing "political affiliation" along with "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests," and "incumbency protection," as one

of the "traditional" districting criteria. *ALBC*, 135 S. Ct. at 1270 (internal quotation marks omitted); *see also, e.g., Hunt v. Cromartie*, 526 U.S. 541, 549-51 (1999); *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (accepting as legitimate state's justification that predominant motive for drawing district lines was politics, not race).

Ignoring that the Court has already soundly rejected the contention that "any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it," *Gaffney*, 412 U.S. at 752, Appellants propose that a court, upon identifying even the slightest population deviation, "inquire into the justification for the deviation." Harris Br. 55. According to Appellants, if the court's review suggests that the deviation was "to achieve an end that is not legitimate (such as gaining partisan advantage or obtaining preclearance under the Voting Rights Act formula this Court has declared to be unconstitutional), this Court should invalidate that scheme as violating the Equal Protection Clause." *Id.* But this approach would lead to circumstances exactly like those Justice Scalia predicted in his *Larios* dissent and be far "more likely to encourage politically motivated litigation than to vindicate political rights." 542 U.S. at 952 (Scalia J., dissenting).

In Appellants' view, where a state's legislative map deviates from perfect equality (even slightly), and *some* aspect of the deviation resulted in *some* part from *some* partisan motivation by *some* individual responsible for redistricting, that map is subject to judicial scrutiny and invalidation. The most obvious problem with this

theory is that it would likely invalidate nearly *every* state legislative apportionment plan drawn by a political body like a legislature. Virtually all such plans contain minor population deviations; indeed, more than twenty states' house or senate plans currently deviate from the ideal population more than does Arizona's.[33] And given how pervasive are partisan considerations in redistricting, *Larios*, 542 U.S. at 952 (Scalia J., dissenting), some of the disparity-increasing lines will inevitably result at least in part from partisan motivation. Thus, notwithstanding Appellants' protestations, nearly every legislative map nationwide would be at risk from their proposed rule.

For that reason, Appellants' proposed rule inevitably would push redistricters to eliminate all population deviations. This result would be inimical to decades of law regarding state legislative redistricting. *See Reynolds*, 337 U.S. at 561 (the rights at stake in one-person, one-vote cases are "individual and personal in nature" and must be considered accordingly). Even with regard to population variations in congressional districts, which are subject to closer scrutiny than are variations in state legislative maps, this Court has emphasized that legitimate state interests can justify departures from perfect population equality. *Tennant v. Jefferson County Commission*, 133 S. Ct. 3 (2012). But under the legal regime proposed here, anyone drawing a state legislative map would know it is folly to

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[33] *See* National Conference of State Legislatures, 2010 NCSL Congressional and State Legislative Redistricting Deviation Table, http://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx (last visited Oct. 21, 2015).

tolerate any deviations because of the danger that they might be found to be motivated in part by someone's political interests. The practice of "zeroing out" districts—thus far limited to congressional district maps—would thus have to become the norm for state and local maps as well.

Appellants' proposed rule is not just boundless, but pointless. Even if partisanship in redistricting is a concern, it is entirely possible to draw egregious partisan gerrymanders with no population deviation at all. It would be a strange legal system indeed that blessed the map in a case like *Vieth*, where line-drawing that achieved perfect population equality also made it likely that one party could carry nearly two-thirds of the seats with one half of the votes, while invalidating a map like the one at issue here, which allocates districts between the two major parties fairly, but happens to have small disparities of population among the districts.

* * *

Appellants claim their proposed rule will "not require this Court to jump into the 'political thicket' and engage in a standardless supervision of state reapportionment." Harris Br. 53. But as the foregoing shows, that is exactly what will happen. Federal courts necessarily will be drawn deep into the political thicket to adjudicate whether state legislative motives were "legitimate" as to every line in every district in which there is even the slightest population deviation. "That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should

become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." *Gaffney*, 412 U.S. at 749-50. The Court should reject Appellants' invitation to radically rewrite the one-person, one-vote doctrine.

CONCLUSION

The decision of the United States District Court for the District of Arizona upholding the Commission's state legislative redistricting plan should be affirmed.

October 26, 2015

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ADDENDUM

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFCATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other

crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

52 U.S.C. § 10304

§ 10304. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of

Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would

otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

Ariz. Const. art IV, pt. 2 § 1 (in relevant part)

> **§ 1. Senate; house of representatives; members; special session upon petition of members congressional and legislative boundaries; citizen commissions.**

(1) The senate shall be composed of one member elected from each of the thirty legislative districts established pursuant to this section. The house of representatives

shall be composed of two members elected from each of the thirty legislative districts established pursuant to this section.

. . .

(3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

. . .

(5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with ten nominees from each of the two largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties in Arizona.

. . .

(6) Appointments to the independent redistricting commission shall be made in the order set forth below. No later than January 31 of years ending in one, the highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate.

. . .

(8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be registered with any

party already represented on the independent redistricting commission and who shall serve as chair.

. . .

(14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below.

A. Districts shall comply with the United States Constitution and the United States voting rights act;

B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;

C. Districts shall be geographically compact and contiguous to the extent practicable;

D. District boundaries shall respect communities of interest to the extent practicable;

E. To the extent practicable, district lines shall use visible geographic features, city, town, and county boundaries, and undivided census tracks;

F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

. . .

(15) Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.

. . .

(16) The independent redistricting commission shall advertise . . . a draft map of legislative districts to the public for comment, which comment shall be taken for at least thirty days. . . . The independent redistricting commission shall then establish final district boundaries.

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No. 14-232

In the Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,
Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Arizona

BRIEF OF APPELLEE SECRETARY OF STATE MICHELE REAGAN IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

1. Does the desire to gain partisan advantage for one political party justify intentionally creating over-populated legislative districts that result in tens of thousands of individual voters being denied Equal Protection because their individual votes are devalued, violating the one-person, one-vote principle?

2. Does the desire to obtain favorable preclearance review by the Justice Department permit the creation of legislative districts that deviate from the one-person, one-vote principle? And, even if creating unequal districts to obtain preclearance approval was once justified, is this still a legitimate justification after *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)?

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INTRODUCTION

Arizona Secretary of State Michele Reagan submits this brief in support of the Appellants and urges the Court to reverse the decision below. The Secretary's predecessor, Ken Bennett, was named as a defendant in this action but did not participate in the trial court proceedings and did not take a position on the constitutionality of the 2011 Arizona legislative redistricting plan. Having the benefit of factual findings by the district court (which the Secretary does not contest), the Secretary believes that the lower court committed multiple errors of law in upholding the plan. The Secretary believes that the plan violates the rights of tens of thousands of Arizona voters by discriminating against residents of some legislative districts in favor of others, without any legitimate government purpose. As an appellee in this matter, the Secretary is "entitled to file documents in this Court," Sup. Ct. R. 18.2, and pursuant to Supreme Court Rule 25.1, the Secretary files this brief in support of the Appellants' position.

The Court should reaffirm the Fourteenth Amendment guarantee that a state's legislative districts be free "from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). In the latest redistricting cycle, the Arizona Independent Redistricting Commission ("IRC") redrew districts for both chambers of the Arizona legislature. As part of that process, it classified multiple districts as potentially qualifying as "ability-to-elect" districts for preclearance purposes under Section 5 of the Voting Rights Act. The IRC proceeded to "strengthen" these districts in an unusual and suspect way: it

intentionally under-populated them and, in doing so, deliberately enhanced the weight of some Arizona citizens' votes at the expense of others' votes. This conscious effort at inequality resulted in a pattern of deviations from the ideal population that falls squarely along political, racial, and ethnic lines. Appellants maintain that the IRC's actual motive for creating these deviations was to obtain Democratic partisan advantage. The IRC denies this charge.

In the Secretary's view, the choice to under- and over-populate electoral districts itself created the constitutional infirmity. Because all enfranchised Arizona citizens are similarly situated with respect to their right to vote, the IRC was obligated to accord their votes equal treatment. *See Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Although this obligation does not require "mathematical exactitude" in equalizing district populations, it does require a process "that does not automatically discriminate in favor of certain districts." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 58 (1970). The IRC, to be sure, had substantial discretion in pursuing neutral redistricting goals. Incidental departures from the ideal population could be justified if necessary to a consistent, nondiscriminatory pursuit of those goals. But a redistricting goal is not "neutral" when it involves the deliberate decision to enhance the voting strength of some districts—and therefore some voters—at the expense of others. The deviations here were not incidental, and therefore the IRC's goals were not neutral.

Nor does Section 5 of the Voting Rights Act justify the deviations. The IRC had multiple tools at its

disposal for protecting Arizona's minority voters, but intentionally under-populating "ability-to-elect" districts was not among them. A statute cannot command a state to violate the Constitution. In addition, Section 5 draws its life from Congress's enforcement authority under the Fourteenth Amendment and is limited to "the letter and spirit" of Fourteenth Amendment guarantees. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (quotation marks omitted). A statute that required or authorized systemic under- and over-population of electoral districts would create "a preferred class of voters" in violation of the Fourteenth Amendment. *Reynolds*, 377 U.S. at 558.

The text of Section 5 is consistent with that limitation and does not promise enhanced voting strength to members of a protected class. The Department of Justice enforcement guidelines confirm (as they must) that the one-person, one-vote principle supersedes all of Section 5's requirements. And, if anything, the IRC's Section 5 defense creates an additional constitutional concern because, under the IRC's version of events, the under-populated districts were selected for preferred treatment because of their racial and ethnic composition.

All of this boils down to one simple principle: intentional voter inequality is not a "tool" for states to use in furtherance of districting goals—*any* districting goals. The Court now has the opportunity to reaffirm that principle. It should do so and reverse the decision below.

STATEMENT

A. The People of Arizona Create a Redistricting Commission

The Arizona Constitution vests the state's lawmaking authority "in the legislature, consisting of a senate and a house of representatives."[1] Ariz. Const. art. 4, pt. 1, § 1(1). The senate is composed of thirty members, one elected from each of thirty legislative districts. Ariz. Const. art. 4, pt. 2, § 1(1). The house of representatives is composed of sixty members, two elected from each of the same thirty legislative districts. *Id.*

The Arizona Constitution requires that the thirty legislative districts be redrawn every ten years. *Id.* pt. 2, § 2(2). In 2000, Arizona voters amended the Constitution by a ballot initiative. The initiative removed authority for redistricting from the state legislature and vested it in an Independent Redistricting Commission ("IRC"). Last term, the Court upheld the provision from a legal challenge under Article I, Section 4 of the federal Constitution. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015).

The IRC is convened for redistricting every decade, by "February 28 of each year that ends in one." Ariz. Const. art. 4, pt. 2, § 2(2). Five Arizona citizens serve as commissioners on the IRC. No more than two

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[1] The Arizona Constitution reserves the power of the Arizona voting public "to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the legislature." Ariz. Const. art. 4, pt. 1, § 1(1).

commissioners may be from the same political party. All of the commissioners are selected from slates of candidates–one Republican slate, one Democratic slate, and one unaffiliated slate. Jurisdictional Statement Appendix ("JSA") 13a.

The IRC adopted its first redistricting plan in November 2001. At the time, Arizona was subject to the preclearance requirement of Section 5 of the Voting Rights Act. *See* 40 FR 43746 (1975). The 2001 plan did not receive preclearance from the U.S. Department of Justice.[2] The Department of Justice's objections concerned proposed alterations to benchmark legislative districts that would result in a drop in the percentage of Hispanic voting age population in the IRC's proposed replacement districts. For instance, the Department of Justice expressed concern about benchmark district 22, which contained a Hispanic voting age population of 65% and which the IRC proposed to split into two districts, both with lower percentages of Hispanic voting age residents. The Department of Justice also objected to alterations to benchmark district 23, containing a Hispanic voting age population of 72.2%, which the IRC proposed to combine with other districts into a new district with 43.6% Hispanic voting age population. The Department of Justice did not object to any districts on the basis of their total population deviation from the ideal (it did not so much as mention population deviations), and it did not suggest that any districts

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[2] *See* Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Lisa T. Hauser and Jose de Jesus Rivera (May 20, 2002), *available at* http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_020520.pdf.

should be intentionally under- or over-populated to comply with Section 5.

The IRC passed another redistricting plan. That second plan, however, was challenged in state court on state-law grounds and invalidated by an Arizona trial court. The IRC adopted another revised plan that was adopted for the 2004 through 2010 elections.[3] That map had a total population deviation of 3.12%.[4]

B. The IRC Convenes for the 2011 Redistricting Cycle

The IRC was convened again in 2010 to execute its constitutional obligation of creating new legislative districts of equal population. The two Republican commissioners appointed for the 2010 cycle were Scott Freeman and Richard Stertz, the two Democratic commissioners were Jose Herrera and Linda McNulty, and the fifth commissioner was Colleen Mathis. As the unaffiliated member of the commission, Ms. Mathis served as the IRC's chairwoman. JSA 13a–14a.

The Arizona Constitution requires the IRC to begin the mapping process by creating a so-called grid map with "districts of equal population in a grid-like pattern across the state." Ariz. Const. art. 4, pt. 2, § 1(14). The

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[3] In 2009, the Arizona Supreme Court held that the revised IRC plan did not violate state law. *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Comm'n*, 208 P.3d 676, 689 (Ariz. 2009).

[4] Population deviations in the second IRC plan are available at the Arizona Independent Redistricting Website, Court-Ordered Map and Tests (approved April 12, 2004), http://azredistricting.org/2001/2004newlegtests/batch7/April%2012%20Adopted%20stats.pdf.

commissioners understood this provision to require that they "begin with a clean slate," without carrying over the cores of districts from the past redistricting cycle. JSA 19a. The IRC chose to create two alternative grid maps, one beginning at the center of the state and moving out counterclockwise, and the other beginning in the southeast corner of the state moving inwards and clockwise. After the alternatives were complete, the IRC voted to adopt the second alternative, which did not have districts of "equal population." *Id.* The overall population deviation was 4.07%. *Id.*

Following adoption of the "grid map," the IRC began the process of adjusting the map, with the goal of producing a "draft map" to be published for public comment. Adjustments were to be made "as necessary" to accommodate the following goals: (a) compliance with the U.S. Constitution and the Voting Rights Act; (b) equal population across districts; (c) compact and contiguous districts; (d) respect for communities of interest; (e) use of geographic features when drawing; and (f) competitive districts.[5] JSA 24a; Ariz. Const. art. 4, pt. 2, § 1(14).

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[5] The IRC did not define or expound on the meaning of compactness, contiguous, communities of interest, or competitiveness. JSA 157a–160a.

The draft plan that emerged from this process had a total population deviation of 5.6%.[6] The most under-populated district in the plan was Republican-leaning District 23 (-3.0%). The IRC's consultants and legal counsel believed that the map contained ten minority ability-to-elect districts (nine Hispanic and one Native American). JSA 28a; *see also* JSA 12a. The minority district with the population deviation furthest below the ideal was District 30, at -2.4%. On October 10, 2011, the IRC approved of the draft map by a vote of 4-1 and published the map to the public for a thirty-day comment period. JSA 28a.

During the comment period, the IRC engaged an expert, Dr. Gary King of Harvard University, to perform an analysis of the draft plan to ensure compliance with Section 5's non-retrogression requirement. JSA 26a. Dr. King determined that "minorities would be able to elect candidates of their choice in all ten proposed ability-to-elect districts in the draft map." JSA 30a.

C. The IRC "Strengthens" Ability-To-Elect Districts by Intentionally Under-Populating Them

At the conclusion of the thirty-day public comment period, the IRC began preparing the final map that would be submitted to the Department of Justice for preclearance. The IRC concluded that ten minority

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[6] The population deviations discussed here for the draft map are available at the Arizona Independent Redistricting Website, Draft Maps (Approved Oct. 10, 2011), http://azredistricting.org/Maps/Draft-Maps/LD/Commission%20Approved%20Legislative %20Draft %20Map%20-%20Population%20Data%20Table.pdf.

ability-to-elect districts would likely be sufficient to obtain preclearance but received advice from its legal counsel and consultants to "strengthen them if there is a way to strengthen them." JSA 30a (internal quotation marks omitted).

The method chosen to "strengthen" the minority districts was to shift portions of their population to other districts. The IRC was advised "that underpopulating minority districts was an acceptable tool for complying with the Voting Rights Act, so long as the maximum deviation remained within ten percent." JSA 30a. According to the IRC's advisors, "underpopulating districts to increase the proportion of minorities was an 'accepted redistricting tool' and something that the Department of Justice looked at favorably when assessing compliance with Section 5." JSA 30a.

At trial, IRC Commissioner Richard Stertz described the process: "By virtue of advice from counsel and their consultant . . . it was the opinion of our team that we needed to strengthen the [minority] districts. And to strengthen the districts, underpopulating those districts was an acceptable mechanism to do so." JSA 174a. The IRC was aware that under-populating minority districts meant over-populating other districts and that the resulting population deviations would have a partisan pattern: "to underpopulate those districts, other districts needed to become overpopulated. And by strengthening those districts, you offload Republicans from one district to another; therefore, overpopulating Republican districts and underpopulating the Democrat districts." JSA

174a.[7] In the process, the IRC removed even minority residents from the districts, often resulting in a decrease of minority voting age population in minority districts. JSA 165a–167a.

The IRC implemented multiple alterations to the final map in its effort to reduce population in the class of districts labeled "ability-to-elect" districts. That is self-evident from the deviation shifts in Districts 2 (-0.1% to -4.0%), 3 (-1.4% to -4.0%), 4 (0.5% to -4.2%), 7 (-1.3% to -4.7%), 19 (-0.5% to -2.8%), 24 (0.2% to -3.0%), 27 (-2.2% to -4.2%), 29 (-0.4% to -0.9%), and 30 (-2.4% to -2.5%). *See supra* note 6. The only district

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[7] *See also* JSA 171a (Commissioner Stertz testifying that the IRC "received advice from counsel . . . that it was okay to underpopulate districts in order to strengthen them as districts in which minorities could elect their preferred candidates"); JSA 169a–170a (Commissioner Stertz testifying that changes "took population out of . . . districts weaken—in my opinion, weakening those, and packed a lot of prison population in . . . . So [District] 8 became a very contrived district that was created at the very end"); JSA 39a–40a (finding that "[a]fter the draft map was completed, both Republican commissioners expressed concern about further depopulating minority ability-to-elect districts" and that the IRC continued depopulating them); Motion to Dismiss Appendix ("MTDA") 30–31 (redistricting record reflecting advice of counsel that "there have been jurisdictions that I've worked with in this redistricting cycle where the majority-minority districts[']deviation was higher . . . because we intentionally under-populated in order to comply with Section 5"); MTDA 35 (redistricting record reflecting change "to reduce the deviations that are in the map, other than the voting rights district"); Joint Appendix 169a–170a (Commissioner Herrera stating that the Voting Rights Act trumps "pretty much everything" and that "if it means moving blocks of people to different districts . . . that their vote may not be or their district may not be as competitive . . . then that's what we have to do").

classified by the IRC as an "ability-to-elect" district that did not fall in population deviation between the draft and final maps was District 26, which moved negligibly from 0.1% to 0.3%. JSA 32a.

In addition, the IRC intentionally under-populated District 8, which fell from 1.5% above the ideal to 2.2% below it. JSA 9a, 34a. According to the district court, the occasion for this change was a suggestion by Commissioner McNulty that the district should be made more competitive. JSA 32a. The IRC's consultants proposed changes to the population deviation, and this sparked opposition from the two Republican commissioners, who complained that the changed favored Democratic interests and "hyperpack[ed]" Republicans into District 11. JSA 32a. At that point, an IRC consultant opined that under-populating District 8 might allow the IRC to present it as an additional ability-to-elect district. JSA 33a. The district court found that "[t]he Republican commissioners were correct that the change would necessarily favor Democratic electoral prospects," and that "Commissioner McNulty did not propose any corresponding effort to make any Democratic-leaning districts more competitive." JSA 32a. The IRC voted 3-2 to adopt changes to District 8, with the Republican commissioners voting against. JSA 33a–34a.

The changes to District 8 increased population deviations in that district and in a number of neighboring districts. JSA 34a. The changes split the political subdivision of Casa Grande in half, cut across an interstate highway, and captured a significant amount of prison population, but did not make the district more competitive. JSA 169a–170a. The IRC

did not present District 8 to the Department of Justice as an ability-to-elect district. JSA 9a, 34a. The district judges were divided as to what motivated the alteration in District 8's population deviation, *compare* JSA 42a *and* JSA 107a–108a, 113a *with* JSA 96a–104a, but the court's findings are clear: the change was intentional. In making these changes and others, the IRC did not consider whether it could create performing Section 5 districts in a plan with substantially equal population. At trial, Judge Wake asked Commissioner Freeman about the IRC's efforts to attain districts of equal population:

> Judge Wake: I have one question, Commissioner. Did the Commission ever draw a plan trying to approach equal population to see how it would play out for non-retrogression?
>
> The Witness: No.

JSA 208a. To the contrary, the IRC intentionally drew districts of unequal population. And, as the IRC represented in its motion to dismiss this appeal, the "consequence" of its decision "[t]o underpopulate an ability-to-elect district . . . often would be to remove population from districts that had a higher proportion of voters who were registered Democrats." Motion to Dismiss at 12–13. Thus, there was a systematic shift upwards in the population deviations in Republican-leaning districts, including in Districts 1 (-2.4% to 1.6%), 5 (-2.1% to 2.8%), 12 (1.7% to 4.1%), 14 (-0.2% to 2.2%), 16 (1.9% to 3.3%), 17 (0.2% to 3.8%), 18 (1.4% to 2.6%), 21 (0.0% to 1.5%), 22 (-1.4% to 1.3%), 23 (-3.0% to 0.2%), 25 (1.8% to 3.6%), and 28 (0.4% to 2.6%). *See supra* n.6; JSA 9a–10a. The district court found it "highly likely that the members of the Commission

were aware of this correlation" between race and political affiliation. JSA 38a. The district court found that the IRC's intentional deviations from equality were "predominantly motivated" by its desire to comply with the Voting Rights Act. *Id.* But it recognized, consistent with the indisputable numbers, that the inequality was systematic. JSA 11a–12a.

D. The Final Map Exhibits an Unmistakable Pattern of Under- and Over-Population Along Racial/Ethnic and Political Lines

The IRC adopted the final map on January 17, 2012, by a 3-2 vote, with both Republican commissioners voting against the map. JSA 35a. The overall deviation of the final map is 8.8%. JSA 112a. With one exception, every district with higher Republican registration than Democratic registration is over-populated, and all but two of the districts with higher Democratic registration than Republican registration are under-populated. JSA 221a–222a. On average, the 11 under-populated Democratic districts are under-populated by 3.03%. JSA 222a. Out of the thirty districts, eighteen have population deviations greater than 2% from the ideal population. *See* JSA 9a–10a; JSA 221a–222a. Of those eighteen, the under-populated districts are all Democratic-plurality districts, and the over-populated districts are Republican-leaning districts. Multiple Democratic-plurality districts push the lower bounds of that deviation range, including Districts 2 (-4.0%), 3 (-4.0%), 4 (-4.2%), 7 (-4.7%), and 27 (-4.2%). JSA 9a–10a. Multiple Republican-leaning districts push the upper bounds of that range, including Districts 12 (4.1%), 16 (3.3%), 17 (3.8%), and 25 (3.6%). *Id.* This was not

inevitable: over-populated districts border on under-populated ones, including District 14 (+2.2%), which borders Districts 2 (-4.0%), 8 (-2.2%), and 10 (-0.9%); and District 28 (+2.6%), which borders Districts 24 (-3.0%) and 30 (-2.5%).[8] *Id.*; Supplemental Appendix SA56.

The population deviations also correlate with the racial and ethnic composition of Arizona's legislative districts. All but one of the ten districts presented to the Department of Justice as ability-to-elect districts are under-populated, nine by more than two percent, and five by four percent or greater. JSA 9a–10a.

At trial, the expert for the Appellants produced an alternative map with deviations ranging from 0.19% above the ideal to 0.19% below it, for a total population deviation of 0.38%. JSA 237a. The alternative plan had enough districts in which the minority population had the ability to elect its preferred candidates for the plan to obtain preclearance under Section 5. JSA 230a–232a. A plan of equal population can satisfy Section 5, and it would be administrable by the Arizona Secretary of State.

On February 28, 2012, the IRC submitted its plan to the Department of Justice. The Department of Justice approved the map on April 26, 2012. JSA 35a.

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[8] These numbers are based on the metric of total population, which the IRC used as the basis for determining its population deviations. Under the rubric of citizen voting age population, the deviations for all districts are much wider, running from 28.98% below the ideal to 25.83% above the ideal. JSA 243a–244a. The total deviation is 54.81%. *Id.* *See Evenwel v. Abbott*, No. 14-940 (2015).

E. The Proceedings Below

The Appellants (they were plaintiffs below) are residents of the districts with population deviations above the ideal. They filed this case on April 27, 2012, alleging that the systematic over-population of their districts—the consequence of the systematic under-population of Democratic plurality districts—violated their equal protection rights. Named defendants included the IRC, the IRC commissioners, and then-Arizona Secretary of State Ken Bennett. Mr. Bennett did not participate in the proceedings below, and he did not take a position on the validity of the IRC's plan or the Appellants' claims.

A three-judge court was convened pursuant to 28 U.S.C. § 2284 (Circuit Judge Clifton and District Judges Silver and Wake). The court presided over a five-day bench trial at the end of March 2013. The court issued a *per curiam* decision on April 29, 2014, with Judges Clifton and Silver voting to reject the Appellants' challenge.

The court placed the burden of proving that the population deviations in the IRC's plan were not justified on the Appellants. The court declined to apply strict scrutiny, despite the racial and ethnic classifications used to identify districts for under-population, because "this is not a racial gerrymandering case." JSA 64a. The court determined that, in the one-person, one-vote context, the burden of proof falls on the party challenging a deviation of under five percent and that it would not "import[] strict scrutiny into the one-person, one-vote context." JSA 64a.

The court assumed, without deciding, that the motive of obtaining partisan advantage "is not a valid justification for departing from perfect population equality." JSA 62a. Judges Clifton and Silver were unable to agree upon a standard to apply "when population deviations result from mixed motives, some legitimate and some illegitimate." JSA 62a. The court assumed, without deciding, that the Appellants could prevail by showing that "illegitimate criteria predominated over legitimate criteria." JSA 63a–65a & n.10.

The court proceeded to conclude that compliance with the Voting Rights Act "is among the legitimate redistricting criteria that can justify minor population deviations" from perfect equality. JSA 65a. The court reasoned that "compliance with a federal law concerning voting rights" must be a legitimate basis for deviation from population equality when multiple state policies, such as "protecting incumbent legislators," may justify deviations. JSA 66a. The court acknowledged that the Voting Rights Act does not purport to authorize population deviations, but found that "a state might improve its chance of obtaining preclearance by presenting a plan that includes minor population variances." JSA 68a n.11. The court cited the Department of Justice's guidelines on redistricting, which provide that alternative plans for protecting minority voters will not be considered if they "'would require *significantly* greater overall population deviation'" than the proposed plan, and it concluded that the Department of Justice may consider alternative plans if the deviations are modest. JSA 69a (quoting Guidance Concerning Redistricting under

Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011)).

Having concluded that compliance with the Voting Rights Act is a legitimate policy justifying population deviations, the court determined that this motive justified the deviations in the IRC's plan. JSA 73a–80a. Again, Judges Clifton and Silver were unable to agree on the details: Judge Clifton concluded that partisanship was a motive in the IRC's decision to under-populate some districts, but not the predominant motive, and Judge Silver maintained that there was insufficient evidence to conclude "that anyone set out to harm the Republicans." JSA 78a–80a; JSA 96a–104a.

Judge Silver wrote a concurring opinion addressing issues left open in the *per curiam* decision. She opined that partisanship likely can be a legitimate justification of population deviations. JSA 88a–93a. She also opined that the applicable standard should be whether the *sole* reason for the population deviations is illegitimate and that the case should not turn on a "predominance" test. JSA 93a–96a.

Judge Wake concurred in part, dissented in part, and dissented in the judgment. JSA 105a–145a. He asserted that the case concerns "systematic population deviation for Democratic Party benefit." JSA 106a. According to Judge Wake, "arbitrariness and discrimination disqualify even 'minor' population inequality within 10%." JSA 116a. State goals "legitimately may be pursued, but not by population inequality." JSA 117a. That principle rules out partisan advantage as a justification for population inequality, at least if it is systematic. JSA 117a–121a.

Judge Wake acknowledged that not all forms of partisan motive in redistricting are subject to judicially manageable standards, but found that this case "is about systematic population inequality for party advantage that is not only provable but entirely obvious as a matter of statistics alone." JSA 120a. "The low-hanging fruit is within the reach of the Equal Protection Clause even if the rest is not." JSA 120a. Judge Wake concluded that the Voting Rights Act purports neither to authorize nor require systematic voter inequality and cannot justify the deviations in the IRC's plan. JSA 122a–124a.

Judgment was entered on April 29, 2014. Appellants filed a timely notice of appeal on June 25, 2014. The Court noted probable jurisdiction on June 30, 2015, and set this case for briefing and oral argument.

SUMMARY OF ARGUMENT

The district court erred in concluding that the IRC's legislative redistricting plan satisfies the equal protection guarantee of electoral districts with substantially equal population. The court's factual findings reveal that the IRC under-populated multiple legislative districts in the plan and that it did so intentionally. The Appellants contend that this decision was motivated by partisanship, and the IRC contends that it was motivated by considerations of race and ethnicity.

Both motivations are illegitimate. Indeed, no motive for deliberately under- or over-populating legislative districts is permissible because any "built-in bias" towards inequality "in favor of certain districts"

conflicts with the state's duty to treat all its citizens equally. *Hadley v. Junior College Dist. of Metro Kansas City, Mo.*, 397 U.S. 50, 57–58 (1970). The Equal Protection Clause obligated the IRC to "adhere[] to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). The district court's factual findings indicate that the pattern of over- and under-population, which falls unmistakably along political and racial and ethnic lines, was what it appeared to be: the conscious choice to prefer one class of citizens over another. The deviations were not the result of "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. The plan therefore cannot survive constitutional scrutiny.

The IRC maintains that Section 5 of the Voting Rights Act justifies its decision to identify voting districts for under-population according to their racial and ethnic composition. The district court erred in ratifying that view. Section 5 of the Voting Rights Act contains no requirement that a state discriminate against its citizens by diluting their voting strength on any basis. In fact, the text of Section 5 disclaims any interpretation that would give members of a protected class the right to representation greater than, or even equal to, their proportion of the population.

But even if Section 5 expressly contained a command to under-populate districts, the IRC could not have taken this course of action because the Constitution is supreme—and the Constitution forbade

the IRC from creating a "preferred class of voters." *Reynolds*, 377 U.S. at 558. Accordingly, neither Congress nor the Department of Justice was able to require a discriminatory plan of intentional vote dilution. Moreover, a Section 5 command of inequality would be unconstitutional because Section 5 depends on the affirmative grant of authority of the Fourteenth Amendment for legitimacy. The Fourteenth Amendment, however, "amply provides for the protection of minorities by means *other than* giving them" enhanced voting strength. *Reynolds*, 377 U.S. at 566 (emphasis added). Congress cannot "enforce a constitutional right by changing what the right is." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

Besides, the IRC's Voting Rights Act defense raises *additional* constitutional concerns. Even if some classifications were appropriate for distinguishing citizens with respect to the value of their votes, race and ethnicity could not be among them. *See Gray v. Sanders*, 372 U.S. 368, 379 (1963). The IRC departed from legitimate racial considerations in redistricting, such as in identifying cohesive racial or ethnic communities of interest or in drawing districts with a sufficient percentage of racial minorities to ensure that the minority community has the ability to elect its preferred candidates. The Secretary supports the use of race for both of those purposes. But neither purpose requires a state to discriminate against its own citizens by tampering with the relative weight of their votes.

The district court therefore sanctioned two violations of the Fourteenth Amendment, and reversal is necessary to correct its legal errors. The Court should order the district court to enter judgment for the

Appellants and remand for the entry of appropriate relief.

ARGUMENT

I. A State May Not, Consistent with Equal Protection, Identify Legislative Districts for Over- and Under-Population Based on Any Classification of Its Voters

The Equal Protection Clause of the Fourteenth Amendment guarantees "fair and effective representation for all citizens." *Reynolds*, 377 U.S. at 565–66. It guarantees "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Id.* at 576. It "demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races." *Id.* at 568.

Inequality of voting power is no small matter: "the rights allegedly impaired are individual and personal in nature"; "the right of suffrage is a fundamental matter in a free and democratic society"; and, hence, this case "touches a sensitive and important area of human rights, and involves one of the basic civil rights of man." *Id.* at 561 (internal quotation marks omitted). "[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 562. That includes alleged deviations from equality of voting power in crafting state legislative districts. *Id.* at 568.

It is undisputed that the IRC did not draw districts of equal population. It is indisputable that the population deviations in the IRC's plan are not random or incidental. They exhibit an unmistakable pattern,

and it is highly unlikely that this occurred by happenstance. As probative as this circumstantial evidence is, direct evidence confirms that the IRC intended this pattern: IRC commissioners admitted at trial that they intentionally under-populated a class of districts; the district court found that they did; and the IRC, as recently as its motion to dismiss, reaffirmed that this occurred.

Those facts are sufficient for reversal. Equal protection requires that state legislative districts be "as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. ."[D]ivergences" from mathematical equality are allowed only if they result from "legitimate considerations incident to the effectuation of a rational state policy." *Gaffney v. Cummings*, 412 U.S. 735, 742 (1973) (internal quotation marks omitted). And a policy is only rational if it is "free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). In short, a state cannot make "an honest and good faith effort" at equal districts by trying to make them unequal. *Reynolds*, 377 U.S. at 577. That occurred here.

A. The Equal Protection Clause Requires a Good-Faith Effort to Attain Districts of Equal Population

Mathematical equality of districts in a state legislative plan is the ideal. *Reynolds*, 377 U.S. at 577. But it need not necessarily be the outcome for the equal protection guarantee to be satisfied. *Roman*, 377 U.S. at 710. Indeed, the "constitutionally permissible bounds of discretion in deviating from apportionment according to population" cannot be "state[d] in mathematical language." *Roman*, 377 U.S. at 710; *see*

also Reynolds, 377 U.S. at 577 ("Mathematical exactness or precision is hardly a workable constitutional requirement.").[9]

Instead, the correct "judicial approach" is to evaluate the *process* by which the plan was produced. *See Roman*, 377 U.S. at 710. The relevant question is whether "there has been a faithful adherence to a plan of population-based representation." *Id.* Under that standard, "minor deviations" from mathematical equality are permissible, but "only as may occur" under a plan "free from any taint of arbitrariness or discrimination." *Id.* Thus, although a state may fail to achieve the ideal of mathematical equality and although such a failure may permissibly be the incidental result of a state's efforts to achieve other goals, mathematical equality must be the "overriding objective." *Mahan*, 410 U.S. at 984. The requirement remains, in all instances, "that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577.

A state's departure from the mandate to pursue mathematical equality is not difficult to identify.

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[9] In contrast to the rules governing congressional reapportionment, the Court has not demanded justification for deviations from absolute mathematical equality of state legislative or local redistricting plans in all instances. *See Mahan v. Howell*, 410 U.S. 315, 323 (1973). The difference follows, in part, from unique state districting interests, especially those inherent in the relationship between state and local governments. *See id.* at 321–22; *see also id.* at 982–83 (upholding a districting plan where "it was impossible to draft district lines" along political-subdivision lines and, at the same time, achieve mathematical equality).

Population inequality, after all, is obvious from census numbers. *See Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004). A plan with large population deviations therefore presents a prima facie case of discrimination; that is, it can be assumed that the state failed to make a good-faith effort at equality if the districts are substantially unequal. *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993). Thus, the burden of "justification" falls on the state, which must show that the deviations were the direct result of a "rational state policy" and do not "exceed constitutional limits." *Id.* (internal quotation marks omitted). "[M]inor deviations" from equality, meanwhile, are facially consistent with a good-faith effort at equality and therefore "are insufficient to make out a prima facie case of invidious discrimination." *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). "[J]ustification by the State" is not required as to such deviations—unless there is further evidence of discrimination. *Id.* at 745, 751–52. "[A]s a general matter, . . . an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." *Voinovich*, 507 U.S. at 161 (internal quotation marks omitted).

But this burden-shifting framework—sometimes called the ten percent rule—does not eviscerate the equal protection guarantee of non-discriminatory districting. This framework merely "serves as the determining point for allocating the burden of proof." *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996).[10] The

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[10] *Accord Larios v. Cox*, 300 F. Supp. 2d 1320, 1340 (N.D. Ga. 2004); *Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 311–12 (E.D.N.Y. 2003); *Montiel v. Davis*, 215 F. Supp. 2d 1279, 1285–86 (S.D. Ala. 2002); *Hulme v. Madison Cnty.*, 188 F. Supp. 2d 1041,

underlying requirement "that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable," *Reynolds*, 377 U.S. at 577, remains applicable, even to plans with a total population deviation of less than ten percent.

B. The Intentional Over- or Under-Population of Legislative Districts Is the Antithesis of a Good Faith Effort to Achieve Equality

The district court failed to hold the IRC to this good-faith standard. The court determined that "plaintiffs must prove that the population deviations were not motivated by legitimate considerations or, possibly, if motivated in part by legitimate considerations, that illegitimate considerations predominated over legitimate considerations." JSA 35a–36a. This standard assumes that there may be legitimate motives for systematic dilution and enhancement of the weight of votes across Arizona, depending on each voter's district of residence.

That cannot be. The "Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation." *Abate v. Mundt*, 403 U.S. 182, 185 (1971). In fact, the Court has never identified *any* interest—political, geographic, racial, or otherwise—as being so entitled. From its earliest decisions interpreting the Fourteenth Amendment, the Court has required that "the law deal[] alike with all of a certain class" of a state's

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1047 (S.D. Ill. 2001); *Abate v. Rockland County Legislature*, 964 F. Supp. 817, 819 (S.D.N.Y. 1997); *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994).

citizens. *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U.S. 150, 155 (1897). State classifications of citizens "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 190–91 (1964). As to the act of voting, "all voters, as citizens of a State, stand in the same relation" as other citizens. *Reynolds*, 377 U.S. at 565–66. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Id.* at 567. Because the enfranchised citizens of Arizona are all similarly situated, there is *no* basis for drawing classifications between and among them in order to intentionally enhance some votes and dilute others. *See id.* This principle rules out most, if not all, "suggested criteria for differentiation of citizens," including "place of residence," "race," and "economic status." *Id.* at 565–66. "The Concept of 'we the people' under the Constitution visualizes no preferred class of voters." *Id.* at 558.

Although this principle forbids classifying citizens for under- and over-valuing their votes, it does not rule out all—or even most—deviations from mathematical equality. A state may draw districts of unequal population, as long as deviations occur incidentally in the pursuit of other goals—*i.e.*, goals unrelated to tampering with the relative worth of votes. Legitimate goals include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). If these criteria are "nondiscriminatory" and are "consistently applied," then resulting

deviations are permissible. *Id.* Implementing a nondiscriminatory plan resulting in population deviations does not involve classifying citizens with respect to the weight of their votes. The state may have "'awareness of [these] consequences,'" but the districting decisions are made "'in spite of,'" not "'because of,'" their adverse effects. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). And the resulting deviations, lacking the guidance of a classification, will almost always be random, not follow any pattern, and not evince any built-in bias.

In contrast, a conscious effort to make districts of unequal population is antithetical to "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. If a state "cannot . . . manipulate its political subdivisions so as to defeat a federally protected right," *Sailors v. Bd. of Ed. of Kent Cnty.*, 387 U.S. 105, 108 (1967), then it certainly cannot manipulate its legislative districts to make their populations unequal, where the Constitution demands an honest effort at equality, *Reynolds*, 377 U.S. at 566 (quoting *Gomillion v. Lightfoot*, 364 U.S. at 347) ("insulation" of state authority from judicial review ends "when state power is used as an instrument for circumventing a federally protected right"). Manipulation itself is the constitutional problem because the "equal population goal is not one factor among others" in redistricting; it is "a background rule against which redistricting takes place." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015). "[I]n light of the Constitution's demands," a state is not free to use inequality as (in the district court's words) a "tool" in

furtherance of its goals. *See id.* at 1270. *Compare* JSA 36a. Equality must be the goal.

The Court, accordingly, has "underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors." *Abate*, 403 U.S. at 185–86. The Court encountered this form of bias in *Hadley v. Junior College Dist. of Metro Kansas City, Mo.*, 397 U.S. 50 (1970), and denounced it—without considering what "motives" the state might have had for its bias. The state in *Hadley* established a formula for divvying six junior college trustee slots among various school districts. Trustees were elected at large, unless one district obtained one-third or more of the population. *Id.* at 57. If a district had more than one-third and less than half of the population, it would elect two of the six trustees, and the rest would be elected at large. *Id.* If a district had between one-half and two-thirds of the total population, it would receive three of the six trustees. *Id.* If the district had more than two-thirds, it would elect four trustees. *Id.*

This plan did "not comport with constitutional requirements" because, "while voters in large school districts may frequently have less effective voting power than residents of small districts, they can never have more." *Id.* at 57. This was "built-in discrimination," and it displayed a "built-in bias in favor of small districts." *Id.* at 57–58. The case would be different, the Court said, if the deviation from equality resulted "from the inherent mathematical complications" of the apportionment—*i.e.*, if deviations

were the incidental result of non-arbitrary, non-discriminatory state objectives unrelated to tampering with the value of votes. *See id.* at 58. "[M]athematical exactitude is not required, but a plan that does not automatically discriminate in favor of certain districts is."[11] *Id.* (internal citations omitted); *see also WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964) (rejecting state redistricting formula that would "of necessity" dilute the votes of those living in "disfavored areas of the State").

Adoption of a discriminatory formula is not the only manner in which a state may "automatically discriminate in favor of certain districts." Where the state takes the process off auto-pilot and assumes the initiative in selecting districts for over- or under-population based on a predetermined classification, it discriminates to an equal degree. The process is as tainted by a "built-in bias" as is a process governed by a biased formula because it is directed towards inequality. *See Hulme v. Madison Cnty.*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001) (finding a violation of the equal protection one-person, one-vote guarantee where the state set a "target" deviation of ten percent, "regardless of the practicality of reaching a lower percentage of population deviation" and manipulated the leeway within that deviation to "cannibalize" certain districts on a partisan basis); *cf. Wells v. Rockefeller*, 394 U.S. 542, 546 (1969) (in congressional case, rejecting "a scheme" that "would permit groups of districts with defined interest orientations to be

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[11] Notably, the formula condemned in *Hadley* would not necessarily have resulted in deviations exceeding ten percent—or in any deviations at all.

overrepresented at the expense of districts with different interest orientations").

The Court's summary affirmance of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), confirmed this principle.[12] *Cox v. Larios*, 542 U.S. 947 (2004). The Georgia legislature in *Larios* drew a legislative plan to achieve two "expressly enumerated objectives: the protection of rural and inner-city Atlanta against a relative decline in their populations and the protection

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[12] *Cox v. Larios*, 542 U.S. 947 (2004), "is an affirmance of the [*Larios*] judgment only." *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1800 (2015) (internal quotation marks omitted). "[N]o more may be read into [it] than was essential to sustain that judgment." *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979). However, the *Larios* judgment speaks volumes because it necessarily depends on the proposition that the ten percent rule is not an unassailable "safe harbor"—the adjudicated deviations being below ten percent. The judgment also depends on the proposition that none of the "justifications" offered by the state were legitimate, which rules out several potential justifications for deviations from the *Reynolds* good-faith rule. *Larios* is merely a faithful application of *Hadley* to a different form of automatic inequality in districting. *Contrast Comptroller of Treasury of Maryland*, 135 S.Ct. at 1800 ("A summary affirmance is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.") (internal quotation marks omitted). Although the Court subsequently noted that *Larios* does not "give clear guidance" on the issue of "whether or when partisan advantage alone may justify deviations in population," (internal quotation marks omitted), it suggested that *Larios* may well apply where a legislature "intentionally sought to manipulate population variances" in a redistricting plan. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 422–23 (2006) (finding reliance on *Larios* "unavailing" where there was no evidence of manipulation). That is the case here. *See infra* at I.C.

of Democratic incumbents." 300 F. Supp. 2d at 1325. But the state set out to accomplish these objectives by manipulating the relative voting strength of millions of citizens, using the ten percent rule as a *carte blanche* for intentional and systematic voter inequality along several identifiable patterns. The resulting plan had a total population deviation of 9.98%; "[t]he most underpopulated districts are primarily Democratic-leaning, and the most overpopulated districts are primarily Republican-leaning"; and the districts with negative deviations were in rural and inner-city regions. *Id.* at 1326.

The district court in *Larios* scoured the record to discern whether the deviations may, in fact, have been the product of "'a faithful adherence to a plan of population-based representation'" without "'arbitrariness or discrimination.'" *Id.* at 1341 (quoting *Reynolds*, 377 U.S. at 710).[13] But the factual record confirmed that the pattern was what it seemed: "[a]t no time did the drafters of the plans nurture the

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[13] Given the pattern of over- and under-population, the *Larios* court would have been justified in shifting the burden to the state. Just as the existence of large deviations in a redistricting plan makes it improbable that the state made a good-faith effort at equality, a pattern of over- and under-population suggests that equality was not the goal. And like a large overall population deviation range, a pattern of under- and over-population is easy to identify: as the *Larios* court observed, "[t]he numbers largely speak for themselves." 300 F. Supp. 2d at 1330. Shifting the burden would be consistent with the Court's equal protection cases. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 270 & nn.13, 21 (1977); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). *See also Hulme*, 188 F. Supp. 2d at 1052.

ambition of drawing maps as close to equal in population as was reasonably practicable." *Id.* The state in *Larios* raised a series of supposed justifications, notable for their seeming resemblance to legitimate "state legislative policies," *see Karcher*, 462 U.S. at 740—except that they all were infected by bias towards inequality.

For instance, the state cited a desire to honor "regionalism" in its districting plan. This would seem to resemble a policy of drawing districts to respect "communities of interest," identified in many cases as being among a state's legitimate "traditional redistricting principles." *See, e.g., Bush v. Vera*, 517 U.S. 952, 962 (1996) (principal opinion). But Georgia's version of "regionalism" was altogether different: it entailed the deliberate decision to give rural residents additional voting strength by manipulating the population sizes of the districts and, by consequence, the weight of their votes. *Larios*, 300 F. Supp. 2d at 1343. But "states cannot seek to protect certain geographic interests by allotting them more seats in the state legislature, and thus more legislative influence, than their population would otherwise allow." *Id.* at 1343 (citing *Reynolds*, 377 U.S. at 566).[14] "Manipulating the legislative districting map to allow

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[14] In holding that "voters cannot be classified, constitutionally, on the basis of where they live" for purposes of diluting their voting strength, the Court in *Reynolds* necessarily excluded other classifications as well. 377 U.S. at 560. That is because not every voter in a district will share in the classification ("race, sex, economic status") by which the district was identified for disfavored treatment. *See id.* at 561. The residents who do not share the classification are being "classified" simply "on the basis of where they live." *Id.* at 560.

rural Georgia and inner-city Atlanta to maintain the number of seats those areas used to have is tantamount to saying that the interests of rural and inner-city voters are simply more important than those of other citizens." *Id.* at 1345.[15]

The state also cited a desire to protect incumbents. *Id.* at 1347–48. And, while the Court has recognized incumbency protection as potentially being a legitimate state policy, *Karcher*, 462 U.S. at 740–41, there was nothing "nondiscriminatory" about the state's unique application of this policy. *See Larios*, 300 F. Supp. 2d at 1347–48. As the *Larios* court correctly observed, incumbency protection typically refers to "the prevention of contests between incumbents" by careful line-drawing to avoid drawing incumbent residencies into the same district. *Id.* at 1347. But the state used the political affiliation of incumbents as the basis for over- and under-populating their respective districts: "The vast majority of districts with negative population deviations were held by Democratic incumbents, while the majority of overpopulated districts were held by Republican incumbents." *Id.* at 1347–48. Incumbency protection is not a neutral policy when it is the arbitrary basis for creating a preferred class of citizens:

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[15] Classifying citizens for enhanced voting strength is distinct from drawing residents into districts based on their shared interests. As to that latter endeavor, the Court has indicated that "age, economic status, religious and political persuasion, and a variety of other demographic factors" are permissible bases for guiding the state's redistricting decisions. *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (*Shaw I*). These are not legitimate bases by which to distinguish citizens for enhanced and diluted votes. *See Reynolds*, 377 U.S. at 561.

those who reside in the districts represented by favored representatives. "This was the very embodiment of a state policy applied in a discriminatory and arbitrary manner."[16] *Id.* at 1348.

In short, a state objective that *sounds* like a neutral policy is not at all neutral if the state chooses systematic voter inequality as its "tool" for implementing the policy.[17] "[M]athematical exactitude is not required, but a plan that does not automatically discriminate in favor of certain districts is." *Hadley*, 397 U.S. at 57–58. Thus, in asking what motivated the IRC to under- and over-populate districts, the lower court "asked the wrong question." *Alabama*, 135 S. Ct. at 1274. The correct question is whether the IRC under-populated districts intentionally or whether the inequality resulted incidentally from the application of a rational policy entailing something *other* than inequality. *See Hadley*, 397 U.S. at 57–58; *Abate*, 403 U.S. at 185–86.

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[16] The state also argued that the deviations could be justified by traditional districting criteria, such as compactness, but there was "not even the slightest suggestion that the population deviations . . . resulted from an attempt" to apply these criteria. *Larios*, 300 F. Supp. 2d at 1350.

[17] Professors Thomas Brunell and Whitney Ross Manzo found that the *Cox v. Larios* decision has had an attenuating effect on population deviations overall as well as a reduction in the blatant partisan use of population deviations. Thomas L. Brunell, Whitney Ross Manzo, *The Impact of* Cox v. Larios *on State Legislative Population Deviations*, 13 Election L.J. 351 (2014).

C. The IRC Intentionally Over- and Under-Populated Legislative Districts

The record evidence, the IRC's admissions, and the factual findings of the district court confirm that the population deviations in the IRC's plan were not the result of a rational state policy, consistently applied. The starting point is the obvious pattern of voter inequality, categorized by the partisan and racial makeup of the districts. Of thirty districts, twelve are under-populated, and all but one of those contain more Democratic-registered voters than Republican-registered voters. JSA 221a. The fourteen most over-populated districts all contain more Republican-registered voters than Democratic-registered voters. JSA 221a–222a. The only over-populated Democratic-plurality districts (there are two) are over-populated by less than 0.3%, and the sole under-populated Republican-plurality district is over-populated by 0.64%. *Id.* Two-thirds of all districts have deviations exceeding 1.0%. Of these twenty-one districts, nine are under-populated and twelve are over-populated. All of these under-populated districts hold a Democratic edge in registration; all of these over-populated districts hold a Republican edge in registration. JSA 9a–10a. Predictably, the two Republican members of the IRC voted against the plan. JSA 35a.

The total population deviations run from 4.07% above the ideal to 4.71% below, for a total population deviation rounding to 8.8%. *Id.* Multiple Democratic-plurality districts push the lower bounds of that deviation range, including Districts 2 (-4.0%), 3 (-4.0%), 4 (-4.2%), 7 (-4.7%), and 27 (-4.2%). JSA 9a–10a. Multiple Republican-plurality districts push the upper

bounds of that range, including Districts 12 (4.1%), 16 (3.3%), 17 (3.8%), and 25 (3.6%). This was not inevitable: over-populated districts border on under-populated districts, and multiple districts saw substantial population shifts from the draft map.

This "stark" pattern is "unexplainable on grounds other than" the intentional creation of unequal voting districts. *Village of Arlington Heights*, 429 U.S. at 266 (citing, *inter alia*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). It suggests, if not proves, a "built-in bias" in the IRC's redistricting process. *Abate*, 403 U.S. at 185–86.

In the face of that clear pattern of inequality, the IRC's only viable defense was that the pattern resulted incidentally from some quirk in the interplay of Arizona's neutral redistricting goals, its geography, its political subdivision lines, and its demographics. The IRC did not raise that defense, and the trial record and the court's findings of fact confirm that the IRC's plan "automatically discriminate[d] in favor of certain districts." *See Hadley*, 397 U.S. at 57–58. As in *Larios*, "[a]t no time did the drafters of the plan[] nurture the ambition of drawing maps as close to equal in population as was reasonably practicable." *See Larios*, 300 F. Supp. 2d at 1326. The IRC received an analysis from its expert from Harvard, concluding that the ten Section 5 districts "would be able to elect candidates of their choice." JSA 30a. Yet the IRC's consultant team advised that the IRC "strengthen" those ten districts by under-populating them. JSA 30a. The IRC implemented multiple changes to that end. These shifts were not the incidental result of neutral redistricting goals: "underpopulating minority districts

was," in the IRC's view, "an acceptable *tool* for complying with the Voting Rights Act," as long as the ten percent rule was respected. JSA 30a (emphasis added).

The IRC was advised to create a "preferred class of voters," and it followed that advice. *Reynolds*, 377 U.S. at 558. The IRC shifted population in Districts 24 and 26, resulting in "an increase of population inequality." JSA 32a. It shifted population from District 8, effecting the deviations in Districts 11, 12, and 16, which became under- or over-populated along partisan lines. JSA 34a. The Republican commissioners opposed the changes, claiming their colleagues were "hyperpacking" Republicans into Republican districts, and they were "correct that the change would necessarily favor Democratic electoral prospects. . . ." JSA 32a.

Districts classified for preferred treatment in every case but one have enhanced representation in the legislature according to the IRC's design, and the sole exception—District 26—is above the ideal population by a negligible amount (0.3%). *Hadley*, 397 U.S. at 57–58. Far from being an accident, the pattern of under- and over-population was the result of "built-in bias" favoring some districts. *Id.*

None of these facts are in dispute or are disputable. And although the district court became preoccupied with what may have motivated the IRC to under-populate districts, this dispute is not germane to the central one-person, one-vote issue: whether the IRC made "an honest and good faith effort" at equal districts, *Reynolds*, 377 U.S. at 577, with deviations "only as may occur" under a plan "free from any taint

of arbitrariness or discrimination." *Roman*, 377 U.S. at 710. The district court's findings, based on unrebutted evidence, indicate that the IRC instead made an effort at *inequality*, in violation of the equal protection rights of Arizona citizens.

II. No Statute Can Authorize or Require That a State Over- or Under-Populate Legislative Districts

The district court erred further in finding that Section 5 of the Voting Rights Act "is among the legitimate redistricting criteria that can justify minor population deviations." JSA 65a. This, again, was the wrong question. The district court approved the view that "underpopulating minority districts [is] an acceptable *tool* for complying with the Voting Rights Act." JSA 30a (emphasis added). That view is on trial here. After all, the IRC did not draw Section 5 districts and only by happenstance deviate from the ideal population. That approach would not likely produce a pattern of population deviations along racial and political lines.[18] Instead, the IRC made inequality of voting strength an objective for its Section 5 compliance strategy by identifying specific districts as "ability-to-elect" districts and going out of its way to under-populate them. JSA 30a. That is altogether different from using Section 5 as a "legitimate

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[18] As with any "neutral" principle of redistricting—and even many non-neutral principles—the state's decisions in preserving a minority group's ability to elect its candidate of choice may involve any number of changes to a district that, by consequence, will raise the population of a minority district above the ideal as often as reduce it below the ideal.

redistricting criteria that can justify minor population deviations." JSA 65a.

A. Section 5 Cannot Create a Preferred Class of Voters

No statute could require, or even authorize, intentional under-population of a class of districts. "[A] plan that does not automatically discriminate in favor of certain districts is" required by the Fourteenth Amendment. *Hadley*, 397 U.S. at 58. Congress, to state the obvious, could not require or authorize Arizona to violate the constitutional rights of its citizens. So even if Section 5 expressly stated that "covered jurisdictions shall under-populate 'ability-to-elect' districts" or that "covered jurisdictions may under-populate 'ability-to-elect' districts as a tool to comply with this Section," the requirement would be "entirely void." *See Marbury v. Madison*, 5 U.S. 137, 178 (1803).

By the same token, the Department of Justice could not, consistent with the Constitution, have enforced or interpreted Section 5 to require over- or under-populated voting districts. An unconstitutional pattern of enforcement or executive-branch interpretation of a statute is no better than a facially unconstitutional statute. *See, e.g.*, *Yick Wo v. Hopkins*, 6 S. Ct. 1064, 1068 (1886); *Stinson v. United States*, 508 U.S. 36, 45 (1993). The mere likelihood that such an interpretation would violate the Constitution would itself be grounds to reject it. *See Rapanos v. United States*, 547 U.S. 715, 737–38 (2006) (plurality opinion). Besides, a Voting Rights Act interpretation by the Department of Justice is entitled to no deference. *Miller v. Johnson*, 515 U.S. 900, 923 (1995).

Interpreting Section 5 to require systematic voter inequality would be unconstitutional for yet another reason. "In our federal system, the National Government possesses only limited powers." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577 (2012). The very legitimacy of Section 5 of the Voting Rights Act depends on Congress's power to enforce the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *see also City of Rome v. United States*, 446 U.S. 156, 176–77 (1980).[19] Accordingly, Section 5 can only be constitutional insofar as it "is consistent with 'the letter and spirit of'" the Fourteenth Amendment. *Katzenbach*, 384 U.S. at 651 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819)). Creating a "preferred class of voters" violates the Fourteenth Amendment. *Reynolds*, 377 U.S. at 558. Thus, although "[o]ur constitutional system amply provides for the protection of minorities," it does so "by means other than giving them majority control of state legislatures" or by enhancing the voting strength of some districts over that of others. *See id.* at 567. Congress "cannot be said to be enforcing" the Fourteenth Amendment by "legislation which alters [its] meaning." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

The lower court cited a single case, *Bush v. Vera*, 517 U.S. 952, 977 (1996) (principal opinion), in support of its conclusion that the Voting Rights Act may justify systematic voter inequality. JSA 65a–66a. In *Vera*, the Court assumed that Section 5 of the Voting Rights Act is a "compelling state interest" in redistricting. 517

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[19] Abrogated on other grounds by *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

U.S. at 982–83. But the Court has always insisted that "compliance with federal antidiscrimination laws" is not a compelling interest unless "reasonably necessary under a constitutional reading and application of those laws." *Miller*, 515 U.S. at 921. *See also Vera*, 384 U.S. at 982–83 (rejecting Section 5 defense where state's actions were not reasonably necessary to avoid retrogression); *Alabama*, 135 S. Ct. at 1273 (remanding for consideration of Section 5 defense case where lower court's interpretation of Section 5 standard was incorrect).

By definition, any compelling interest in Section 5 compliance cannot extend to violations of constitutional guarantees—including the guarantee that the state will make a "good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. It was not "reasonably necessary under a constitutional reading and application" of Section 5 for the IRC to under-populate ability-to-elect districts. *Miller*, 515 U.S. at 921.

B. Section 5 Does Not Purport to Create a Preferred Class of Voters

It should come as no surprise, then, that nothing in the text or the Department of Justice enforcement regulations suggests that deliberately under-populating districts is "an appropriate tool" for Section 5 compliance. The IRC therefore cannot rely on Section 5 to justify the deviations in its plan.

Section 5 is violated if "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] . . . in

that its members have *less* opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added). This provision cannot be read to guarantee any voter or group of voters *more* opportunity than others to elect their preferred candidates. In fact, the text of Section 5 confirms that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). By necessary inference, nothing in the text of Section 5 purports to give any group of voters a right to greater representation than their proportion of the population.

The Department of Justice's enforcement guidance is not to the contrary. "Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." Guidance Concerning Redistricting under Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011) ("DOJ Guidance"). The Department of Justice recognizes that "[t]here may be circumstances in which the jurisdiction asserts that, because of shifts in population or other significant changes since the last redistricting . . . retrogression is unavoidable." DOJ Guidance at 7472.

True, the Department of Justice may have considered a plan with something less than "significantly greater overall population deviations" than the IRC's proposed plan as being "a reasonable alternative" to that plan. JSA 69a (quoting DOJ Guidance at 7472). But the DOJ Guidance here plainly refers to deviations "as may occur" under a plan "free from any taint of arbitrariness or discrimination,"

Roman, 377 U.S. at 710, not to a plan that "automatically discriminates in favor of certain districts," *Hadley*, 397 U.S. at 58. Nothing in the enforcement guidelines so much as suggests that under-populating districts is a "tool" for Voting Rights Act compliance. The DOJ Guidance does not and cannot purport to authorize intentional deviations in favor of any class of Arizona citizens.[20]

C. The Apparent Racial and Ethnic Underpinnings of the IRC's Classification of Districts for Over- and Under-Population Raise Additional Equal Protection Concerns

The IRC's invocation of the Voting Rights Act raises further concerns given the apparent racial and ethnic considerations involved. The district court found that "the predominant reason for the deviations" in the IRC's plan was the IRC's desire to comply with the Voting Rights Act. JSA 6a. That finding must mean that the characteristic used by the IRC to identify districts for over- and under-population was the race and ethnicity of the districts' citizens (or a certain proportion of their citizens). While the district court assumed that classifying the districts for unequal treatment because of their partisan tendencies would

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[20] The Arizona Secretary of State takes no position on the question whether Section 5 can remain a legitimate interest in light of *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013). In the Secretary's view, neither Section 5 nor any other statute can provide a compelling interest for a state to discriminate against citizens by tampering with the relative weight of their votes. That is sufficient to resolve this case.

not be legitimate, classifying them as the IRC appears to have done is, if anything, more problematic.

The Court's "Fourteenth Amendment jurisprudence[] . . . always has reserved the strictest scrutiny for discrimination on the basis of race." *Shaw I*, 509 U.S. at 650 (1993). The Court addressed the question whether race and ethnicity are legitimate classifications by which to over- or under-weight citizens' votes over fifty years ago: "If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the [black] vote, none could successfully contend that that discrimination was allowable." *Gray v. Sanders*, 372 U.S. 368, 379 (1963). There is no distinction between the use of race prohibited in *Gray* and the IRC's use of race in classifying districts for under-population. *Gray* left little room to doubt that the district court erred in approving that use:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—*whatever their race*, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

Id. at 379 (emphasis added); *see also Reynolds*, 377 U.S. at 565–66.

Although *Gray* is more commonly remembered as the Court's first invocation of "one person, one vote," its rejection of race-based vote-dilution is critical because

it set forth the premise underlying that historic conclusion. Having observed that "none could successfully contend" that race (or sex) is a proper classification by which to distinguish citizens for unequal votes, the Court could proceed to conclude that "every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates." *Gray*, 372 U.S. at 379–80. Race has nothing to do with the proper weight to be accorded to an individual's vote, but neither does any other classification. And that "can mean only one thing—one person, one vote." 372 U.S. at 381. In that sense, the prohibition on race-based vote-dilution was antecedent to the broader one-person, one-vote rule, and the lower court was mistaken in declining to "import[]" the Court's racial-discrimination framework "into the one-person, one-vote context." JSA 64a. One person, one vote emerged from that framework. Basic equal protection principles demand nothing less than racial equality for all Arizona citizens as to the weight of their votes, if nothing else.[21] *Cf. Gaffney v. Cummings*, 412 U.S. 735, 751–52 (1973).

To be sure, legitimate, redistricting-specific uses of race were available to the IRC. "Race can be used, for

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[21] That conclusion follows from the Court's racial discrimination jurisprudence generally. *See, e.g., Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.); *University of California Regents v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.,); *White v. Regester*, 412 U.S. 755, 765–66 (1973); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Gomillion v. Lightfoot*, 364 U.S. 339, 341, 347–48 (1960).

example, as an indicator to achieve the purpose of neighborhood cohesiveness in districting." *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality opinion). The allowance of race-conscious districting in this manner follows from the unique nature of drawing electoral districts. The process requires a state to group people together based on its perception of "actual shared interests." *Miller*, 515 U.S at 916). The state must make decisions about what "interests" are shared among what citizens, and the Court has rightly allowed it to use race as one factor among many in identifying those interests. *Shaw I*, 509 U.S. at 642 (stating that it was "wise" for litigants to concede that "race-conscious redistricting is not always unconstitutional"). It is only when race predominates over other redistricting criteria that the use of race triggers strict scrutiny. *Miller*, 515 U.S. at 916. Falling short of that, the state may weigh race in the balance in deciding how best to unite communities into electoral districts.

A second legitimate use of race in districting is in creating majority-minority districts under Section 2 of the Voting Rights Act and in avoiding retrogression in minority voting strength under Section 5 of the Voting Rights Act. Although such efforts have created disagreement on the Court about when strict scrutiny is triggered, *compare Bush v. Vera*, 517 U.S. 952, 962 (1996) (principal opinion) *with id.* at 996 (Kennedy, J., concurring) *and id.* at 999–1000 (Thomas, J., concurring in the judgment), the Court has signaled that drawing majority-minority districts is, at least, a legitimate government interest when the use of race is narrowly tailored "under a constitutional reading and application" of the Voting Rights Act. *Miller*, 515 U.S. at 921. Likewise, the Court has assumed that

compliance with the non-retrogression command of Section 5 is a compelling government interest, as long as the use of race is narrowly tailored. *Vera*, 517 U.S. at 977, 982–83; *see also Alabama*, 135 S. Ct. at 1274.

The IRC's decision to under- and over-populate districts was neither necessary nor relevant to either legitimate use of race. The IRC departed from the use of race as one factor for identifying "actual shared interests" because enhancing the voting strength of all residents of minority districts does not in any way unite individuals or communities based upon their commonalities. In fact, the record evidence shows that the IRC's alterations removed *Hispanic* residents from Hispanic districts in order to under-populate those districts. JSA 165a–167a. That course of action did not safeguard or advance the political cohesion of Arizona's minority communities.

Nor was there any need for the IRC to manipulate population deviations to draw Voting Rights Act districts. Creating a Voting Rights Act district involves drawing lines around a certain percentage of minority voters (typically, a politically cohesive community) to ensure that the minority community is competitive in elections in that district. It does not involve affording residents of a given district (*all* residents, minority or not) enhanced voting strength as compared with residents of other districts. In creating a "majority-minority" district (the *only* means for Section 2 compliance) the state ensures that "a minority group composes a numerical, working majority of the voting-age population" in the district. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). In drawing an "influence" or "crossover" district (which may be legitimate tools for

Section 5 compliance),[22] the state draws a sufficient percentage of minority voters into the district to ensure a perceived optimal level of competitiveness.[23] *See id.* Attaining a certain percentage of minority voters in the district is the goal, and a state does not need the "tool" of intentional under-population to attain it.[24]

The IRC did not advance its interest in drawing Voting Rights Act districts by under-populating them as a class. If the districts needed to be "strengthened," the IRC should have increased the percentage of

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[22] The third question presented to this Court on appeal concerned whether influence or crossover districts are permissible avenues for Section 5 compliance—a question left open in *Alabama*, 135 S. Ct. at 1273. The Court has declined to hear argument on that question, and the Secretary does not, in any event, have a view on the issue.

[23] An "influence district" exists where a minority group is sufficiently large to "influence the outcome of an election" in a given district. *Bartlett*, 556 U.S. at 13. In a "crossover district," "the minority population . . . is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.*

[24] The Department of Justice's objections to the IRC's 2001 plan reflected that analysis. The Department of Justice identified several districts in the benchmark plan with high percentages of minority voting age population. It then analyzed the proposed replacement districts and observed that they had substantially lower percentages of minority voting age population. After reviewing voting patterns, the Department of Justice confirmed that the replacement districts retrogressed from the benchmark plan. The deviation of the total population from the ideal in the districts of concern had no bearing on the analysis. *See* Letter from Ralph F. Boyd, *supra* note 2.

minority voters within the districts it perceived to be weak. But many of the IRC's alterations *reduced* the districts' percentage of Hispanic voting age population. JSA 165–167a. *Contrast Beer v. United States*, 425 U.S. 130, 142 (1976) (looking to percentage voting-age population in minority districts for retrogression analysis); *Alabama*, 135 S. Ct. at 1274 (same). The result of consciously under-populating these districts was not to ensure competitiveness within given districts, but to enhance and dilute the weight of Arizona citizens' votes across the state, according to a racial and ethnic classification. The Court has never recognized this use of race as being permissible, and decades-old precedent indicates that it is not.

The district court had a very different concept of legitimate racial-conscious districting. It opined that states may "do more than the bare minimum to avoid retrogression," that they may "overshoot the mark," and that they may "aim higher than might actually be necessary" for Voting Rights Act compliance. JSA 22a–23. This Court has taken a far more cautionary approach in this sensitive area: "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655. This standard does not require that a state "guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive." *Alabama*, 135 S. Ct. at 1273. But it does require that a state make the appropriate considerations—such as "what percentage reduction" in voting strength in a given district might be "retrogressive"—and not shoot for a goal entirely unrelated to the Voting Rights Act—such as tampering

with the weight of citizens' votes. The IRC's race-based decisions were well off the mark, had little if any relation to preserving the ability of minority communities to elect their preferred candidates, and were impermissible under the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, the judgment of the district court should be reversed, and the case remanded for the lower court to afford relief.

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WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT OF ARIZONA

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INTRODUCTION

The Commission's redistricting scheme diluted the votes of 3.9 million Arizona citizens in eighteen legislative districts. The district court found the Commission systematically malapportioned Arizona's legislative districts for two reasons. First, the Commission desired to gain partisan advantage for the Democrat party (an objective the district court assumed to be illegitimate); second, the Commission desired to secure Justice Department preclearance under Section 5 of the Voting Rights Act.[1] Importantly, the district court did *not* find drawing unequally-populated districts was necessary to achieve any of the neutral redistricting criteria (such as keeping counties in the same district) enumerated in Arizona's Constitution. Ariz. Const. art. IV, pt. 2, § 1(14)(F).[2] And, in contrast to the malapportioned state legislative districts, when the Commission drew Arizona's congressional districts, it did so with zero deviation.[3]

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1. *Harris* v. *Arizona Indep. Redistricting Comm'n*, 993 F. Supp.2d 1042 (D. Ariz. 2014), reprinted in Jurisdictional Statement Appendix (J.S.App.) 36a, n.7; 63a, n.10; 38a; 107a-108a.

2. The Arizona constitution directs the Commission to create districts that are equally-populated, contiguous and compact, to preserve communities of interest and geographic features such as municipal and county boundaries. And, the Arizona constitution directed the Commission to create politically competitive districts to the extent "it would create no significant detriment to the other goals." Ariz. Const. art. IV, pt. 2, § 1(14)(F).

3. See the Commission's website at: <http://azredistricting.org/Maps/Final-Maps/Congressional/Reports/Final%20Congressional%20Districts%20-%20Population%20Data%20Table.pdf> (last visited November 24, 2015).

There is no question the Commission's apportionment of Arizona's state legislature violates the one-person, one-vote principle this Court announced in *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964).[4] This appeal asks whether the Commission's violation of the one-person, one-vote principle can be justified by a desire to gain partisan advantage or, alternatively, to win Justice Department preclearance approval and, if the latter, whether, this justification for unequally-populated districts is still valid after this Court's decision in *Shelby County, Ala.* v. *Holder*, 133 S. Ct. 2612 (2013).

The Commission (and allied *amici* defending the Commission's malapportioned scheme) sound three themes. *First*, they contend there is a "safe harbor" allowing the Commission to violate the one-person, one-vote guarantee for any reason so long as the deviation does not exceed 10%. *Second*, they claim the Commission's "good faith" belief that it needed to underpopulate twelve districts to obtain Justice Department approval justifies a reapportionment scheme that dilutes the votes of millions of Arizona citizens. And, *third*, they suggest federalism and state sovereignty require this Court to defer to the Commission's reapportionment scheme even when the scheme violates the one-person, one-vote principle.

Each of these arguments is wrong.

---

4. The ideal population for each of Arizona's 30 legislative districts is 213,067. See Suppl. J.A. 59. 3,907,652 Arizona citizens are assigned to eighteen overpopulated districts where their vote is diluted, and 2,484,365 Arizona citizens are assigned to twelve favored districts where the weight of their vote is increased.

ARGUMENT

I. There is no 10% "safe harbor" and, to the extent there is a burden-shifting rule when a redistricting scheme deviates by less than 10%, the district court found the malapportioned districts were not necessary to achieve a legitimate state policy free from arbitrariness or discrimination.

The centerpiece of the Commission's argument is the existence of a supposed "safe harbor" permitting the Commission to dilute citizens' votes up to 10% without judicial oversight. AIRC Br. p. 30 ("Population deviations under 10% in legislative district plans are considered *de minimis* population variances that generally do not require state justification."). The Commission claims this Court established this 10% safe-harbor in *Brown* v. *Thomson*, 462 U.S. 835 (1983).

The United States similarly argues this Court has "adopted a strong presumption" that an "apportionment plan with deviations under 10% is constitutional." U.S. Br. p. 12. And, "In order to overcome the strong presumption of constitutionality and impose a burden of justification on the state, a plaintiff challenging minor deviations must come forward with sufficient evidence to infer that a redistricting plan reflects invidious discrimination." *Id.* at 13 (citing *Gaffney* v. *Cummings*, 412 U.S. 735, 740-41 (1973)).

First, there is no 10% "safe harbor" allowing redistricting schemes to violate the one-person, one-vote principle. *Second*, the district court found the only reason the Commission malapportioned Arizona's legislature was

the Commission's desire to (a) confer partisan advantage on the Democrat Party; and, (b) obtain Justice Department preclearance – a consideration that is no longer relevant after *Shelby County*. Neither objective is a rational and legitimate state policy which justifies diluting the votes of disfavored citizens in violation of the one-person, one-vote principle.

A. There is no 10% "safe harbor" from the one-person, one-vote principle.

We begin with the fundamental principle this Court announced in *Reynolds*.

> [T]he right of suffrage is a fundamental matter in a free and democratic society. *** any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *** Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. *** To say that a vote is worth more in one district than in another would run counter to our fundamental ideas of democratic government.
>
> *Reynolds*, 377 U.S. at 562-64.

Beginning in the late 1950s this Court debated whether reapportionment disputes were justiciable. *Colegrove* v. *Green*, 328 U.S. 549 (1946), and *Baker* v. *Carr*, 369 U.S. 186 (1962), are the leading decisions in this debate. Justices Frankfurter and Harlan argued reapportioning state legislative and congressional districts was not a justiciable

controversy and they said reapportionment was a political question beyond this Court's authority to superintend. *Id.* Justices Frankfurter and Harlan counseled this Court to avoid jumping into the "political thicket."[5] But, over their dissent, this Court found itself constitutionally obligated to superintend the Constitution's guarantee of equal protection. Justice Douglas summarized this point, "the Court has never thought that the protection of voting rights was beyond judicial cognizance. Today's treatment of those cases removes the only impediment to judicial cognizance ***." *Baker v. Carr*, 369 U.S. 186, 249-50 (1962) (Douglas, J., concurring). Justice Clark's separate concurrence in *Baker* provides further justification for this Court superintending, and invalidating when necessary, state reapportionment schemes that are a "crazy quilt" of inequality. *Id.* at 260. In *Gray* v. *Sanders*, 372 U.S. 368, 382 (1963), this Court held, "Within a given constituency, there can be room for but a single constitutional rule – one voter, one vote."[6]

This Court recognized the Fourteenth Amendment's Equal Protection Clause guarantees equal weight to every citizen's vote – the one-person, one-vote principle. "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote." *Gray*, 372 U.S. at 382.

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5. *Colegrove*, 328 U.S. at 556. Justices Frankfurter and Harlan lost this debate.

6. Citing *United States* v. *Classic*, 313 U.S. 299 (1941).

In 1964 this Court decided seven cases in which the one-person, one-vote principle governing reapportionment of state legislative and congressional districts was given full flower.[7] Since 1964 this Court has been unwavering in its support of this one-person, one-vote principle.

There is no magic number below which a state may freely deviate from population equality (even "minor" deviations) without a legitimate and rational reason to do so.[8] In *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964), this Court noted:

> [Reviewing the legitimacy of a redistrict scheme] does not lend itself to any such uniform formula, and it is neither practical nor desirable

7. *Wesberrry* v. *Sanders*, 376 U.S. 1 (1964), *Reynolds* v. *Sims*, 377 U.S. 533 (1964), *Roman* v. *Sincock*, 377 U.S. 695 (1964), *Davis* v. *Mann*, 377 U.S. 678 (1964), *WMAC* v. *Lamenzo*, 377 U.S. 633 (1964), *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964), and *Lucus* v. *Colorado*, 377 U.S. 713 (1964).

8. In *Reynolds*, 377 U.S. at 533, this Court held "mathematical exactness or precision is not a workable constitution requirement." This statement was a recognition of the census information and mapping technology available a half-century ago. We now have powerful computers, Global Positioning Systems and Global Information Systems that allow much more precise mapping and districting of voting districts. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring) ("Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months."). This modern technology not only allows voting districts to be created with much more precision to achieve the one-person, one-vote standard but it also allows political operatives much greater ability to model and determine the partisan political behavior of voting districts. *Id.*

> to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a *faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.*[9]

Similarly, this Court emphasized "the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State.'" *Mahan* v. *Howell*, 410 U.S. 315, 328 (1973) (quoting *Swann* v. *Adams*, 385 U.S. 440, 445 (1967)). In *Mahan* this Court upheld a 16% population deviation in Virginia's senate districts because the deviation was incidental to the state legislature's neutral policy of creating legislative districts that preserved county boundaries. *Id.* In *Kilpartick* v. *Preisler*, 394 U.S. 526, 531 (1969), this Court explained, "[t]oleration of even small deviations detracts from" the constitutional command of "equal representation for equal numbers of people ***." Only those "limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown," are permissible." *Id.*; see also *Abate* v. *Mundt*, 403 U.S. 182, 188 (1971) (Brennan, J., dissenting).

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9. Emphasis added.

We do not dispute the ability of a state to reapportion its legislature making minor deviations from perfect equality when those deviations are the necessary result of achieving a rational and legitimate state policy such as keeping political subdivisions intact and in a single district. But that is not this case here.

The Commission and its defenders make too much of *Brown*. *Brown* was an "extraordinarily narrow" plurality decision "empty of likely precedential value." *Brown*, 462 U.S. at 850 (Brennan, J., dissenting).

In *Brown*, Wyoming's constitution provided that each county should have at least one representative in the Wyoming state legislature. This meant that Wyoming's least-populated county, Niobrara County, had one representative even though the population of Niobrara County was 2,924 less than the ideal district population of 7,337.[10] Wyoming's state legislature reapportioned its 64-member legislature granting the residents of Niobrara County one representative instead of combining Niobrara County with a neighboring county and reducing the legislature to 63 seats.

The Wyoming legislature could have reduced the size of the legislature and eliminated the Niobrara County representative. Had it chosen to do so, each individual member of Wyoming's legislature would have enjoyed incrementally increased political power. But the Wyoming legislature instead acted contrary to the legislators' personal political interest and adopted a reapportionment

10. The "ideal population" is the total population of the state divided by the total number of legislative districts.

plan that, consistent with Wyoming's constitution, granted the residents of Niobrara County a representative. Wyoming's legislature found "the policy of this state is to preserve the integrity of county boundaries as election districts for the House of Representatives." *Id.* at 839, n.4.[11]

Justice Powell, writing for the plurality of three justices, noted, "The issue in this case concerns only Niobrara County." *Id.* at 839. And, in this context, noted, "We have recognized that some deviations from population equality may be necessary to permit States to pursue other legitimate objectives such as 'maintain[ing] the integrity of various political subdivisions' and 'provid[ing] for compact districts of contiguous territory.'" *Id.* at 842.

Justices O'Connor and Stevens concurred but only because the holding involved the limited question of Niobrara County being granted a representative and not because they endorsed the population deviations in Wyoming's state-wide reapportionment scheme. *Id.* at 850.

Four justices dissented and, Justice Brennan noted the "narrow" and "limited" holding reached by the plurality. *Brown*, 462 U.S. at 850. Moreover, *Brown* was deemed "neither authority for nor relevant to the question of the validity of" Wyoming's subsequent redistricting plan by the three-judge U.S. District Court for the District of Wyoming in *Gorin* v. *Karpan*, 775 F. Supp. 1430, 1443 (D. Wyo 1991) (holding *Brown* turned on narrower issues

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11. Wyoming's reapportionment of its state legislature was by elected and politically-accountable members of Wyoming's legislature – not an unelected and politically unaccountable commission.

than were relevant in the subsequent 1991 Wyoming redistricting plan).

It is true that Justice Powell wrote, "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. *** A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State."[12] But only two other justices, Burger and Rehnquist, joined this statement, and Justices Stevens and O'Connor separately concurred to qualify their assent.

Brown and *Gaffney* v. *Cummings*, 412 U.S. 735 (1973) – the two cases upon which the defenders primarily rely – do not hold that population deviations of less than 10% are immune from judicial review. Quite the contrary. In each case the Court *considered* at length and in great detail the justification for the deviation and found the deviation was justified by a neutral state policy of drawing districts that incorporated political subdivisions. *Gaffney* involved a reapportionment of the Connecticut General Assembly that involved variations from strict mathematical equality due to the neutral state policy of preserving town boundaries pursuant to a state constitutional policy that it do so. 412 U.S. at 737 ("In Connecticut, towns rather than counties are the basic unit of local government. *** The State Constitution provides that, 'no town shall be divided' for the purpose of creating House districts ***.").

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12. *Brown*, 462 U.S. at 842-43 (citing *Connor* v. *Finch*, 431 U.S. 407, 418 (1977), and *White* v. *Regester*, 412 U.S. 755, 764 (1973), as support for the first point and *Swann* v. *Adams*, 385 U.S. 440, 444 (1967), for the second point).

This Court repudiated the notion of a 10% "safe-harbor" when it affirmed the three-judge district court decision in *Larios* v. *Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), *summarily aff'd*, 542 U.S. 947, 949 (2004). In *Larios* this Court denied review of a three-judge district court's decision holding a reapportionment plan with deviations less than 10% unconstitutional. Justice Stevens, joined by Justice Breyer, noted "[A]ppellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation."

B. The district court found the Commission diluted the votes of disfavored citizens for illegitimate and discriminatory reasons.

We do not say absolute mathematical perfection is required.[13] Rather, we say there is no "safe-harbor" allowing the Commission to violate the constitutional guarantee of equal protection. A redistricting scheme that deviates from the one-person, one-vote principle, even by a "minor" amount of 10%, must still be justified by a legitimate state objective like keeping counties in the same district.

Further, as Judge Wake recognized, the "10% rule" is not a "safe harbor" but a burden-shifting principle. *Harris*, J.S.App. 115a-116a. Judge Wake correctly

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13. "This Court has rejected a more stringent standard of mathematical precision, first, in order to protect the quintessential sovereign functions that states exercise when they draw their own legislative districts." AIRC Br. p. 31.

explained "[f]alling below 10% does not make population deviations constitutionally insignificant. It just changes who has the burden of proof." *Id.* at 136a.

The district court held the Commission unequally-populated Arizona's state legislative districts to accomplish two ends. First, to gain a partisan advantage for the Democrat party; and second, to satisfy the Commission's perceived belief that malapportioned districts were necessary to gain Justice Department preclearance. So, do these two objectives justify diluting the votes of more than 3 million Arizona citizens?

The Commission's consultant wrongly advised the Commission that "underpopulating minority districts was an acceptable tool for complying with the Voting Rights Act, so long as the maximum deviation remained within ten percent." *Harris*, J.S.App. 30a. And the Commission wrongly relied on this notion. A partisan desire to benefit the Democrat party and a perceived "good faith" belief the Justice Department required malapportioned districts to preclear the Commission's reapportionment scheme were the only two reasons the district court found to justify the vote dilution in the Commission's reapportionment scheme.

As Judge Wake noted, "Judge Clifton correctly finds that the IRC was actually motivated by both party advantage and hope for Voting Rights Act preclearance. So we have a majority for that finding of fact." J.S.App. 107a. Judge Wake explained, "the Commission continued adjusting the map with an eye to depopulation for party advantage even after the cover of the Voting Rights Act played out." *Id.* at 139a. So, even if the "Commission's first acts of depopulation had the cover [provided by the

Voting Rights Act], the last acts did not." *Id.* Judge Clifton likewise noted, "There's a thumb on the scale and the question becomes what kind of thumb is it or what is the thumb pressing for?" Tr. Trans. p. 1241 (13-15).

District 8 is emblematic of the Commission's illegitimate objectives. The District Court found that Commissioner McNulty presented changes to District 8 "as an opportunity to make District 8 into a more competitive district," but in practice, "that simply meant making District 8 into a more Democratic district." J.S.App. 41a. What was missing was any attempt "to create a series of competitive districts out of both Democrat- and Republican-leaning districts" or "defined standards evenhandedly [applied] across the state." *Id.* at 42a. Instead, she sought to make a single Republican-leaning district more amenable to "Democratic interests." *Id.* And there was no question that the Commission was aware of the partisan implications that changes in District 8 would have, since both Republican commissioners recognized that packing Republican voters into the over-populated District 11 would "aid Democratic prospects in District 8." *Id.* Thus, the underpopulation of District 8 can only be explained as an exercise in partisanship, since it cannot be explained by having any relevance to preclearance.

Thus, a majority of the three-judge district court held partisanship was one of the two reasons the Commission crafted its apportionment scheme. Judge Wake explained the Commission engaged in "systematic population inequality for party advantage that is not only provable but entirely obvious as a matter of statistics alone." J.S.App. 120a.

The district court assumed partisanship is an illegitimate reason to dilute the votes of disfavored citizens. J.S.App. 35a-36a. But Judges Clifton and Silver nonetheless affirmed the redistricting scheme because they believed the Commission had a "good faith" desire to win Justice Department preclearance and believed that malapportioning twelve districts and thereby diluting the vote of more than 3 million Arizona citizens was necessary to win Justice Department approval. *Id.* at 4a.

The Commission's malapportionment of Arizona's state legislature is contrary to this Court's one-person, one-vote principle, contrary to the Equal Protection Clause of the United States Constitution and contrary to the direction of Arizona's state constitution that likewise requires equally-populated legislative districts.

II. The Voting Rights Act neither compels nor justifies vote dilution.

The district court assumed that obtaining a partisan advantage for the Democrat party was not a legitimate reason to dilute the vote of Arizona citizens in disfavored districts' votes while overweighting the vote of other Arizona citizens in favored districts. J.S.App. 36a ("We assume that seeking partisan advantage is not a legitimate consideration ***."). But two judges, Clifton and Silver, nonetheless affirmed the Commission's malapportioned legislative districts because they believed the Commission malapportioned Arizona's legislature to win Justice Department preclearance on the first submission of its reapportionment scheme.

The Commission's "desire-for-preclearance" excuse for diluting almost 3 million Arizonans votes fails for two reasons.

First, the Voting Rights Act does not, and cannot, compel state malapportioned districts violating the constitutional one-person, one-vote principle. A statute cannot compel action that violates the Constitution. This Court held, "[w]e do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Miller* v. *Johnson*, 595 U.S. 900, 922 (1995).

Second, even if the Commission genuinely believed systematically diluting some citizens' votes was necessary to obtain preclearance, this Court's decision in *Shelby County* invalidates the legitimacy of that justification. As Judge Wake explained, "Assuming we could give Section 5 preclearance continuing reach into the future, it would be extraordinary that Congress used a law protecting equality of voting rights to authorize systematic partisan malapportionment, even defeating state law that prohibits it." J.S.App. 144a. And, Judge Wake further observed, "systematic population inequality that is otherwise irrational and discriminatory is a reasonable means to obtain preclearance." *Id.* at 106a.

A. The Voting Rights Act does not compel vote dilution.

The Commission defends its unequal redistricting scheme by saying, in essence, the Voting Rights Act made the Commission malapportion Arizona's legislature to gain Justice Department preclearance. The Commission's

advisor, Adelson, told the Commission "underpopulating minority districts was an acceptable tool for complying with the Voting Rights Act, so long as the maximum deviation remained within ten percent." *Harris*, J.S.App. 30a.

The district court found the Commission relied upon Adelson's advice. But Adelson was wrong. The Voting Rights Act does not compel vote dilution and the Justice Department cannot compel vote dilution as a condition upon which to grant preclearance. See *Miller*, 595 U.S. at 922.

Section 5 of the Voting Rights Act "warrants a denial of preclearance if a covered jurisdiction's voting change 'ha[s] the purpose *** or effect of denying or abridging the right to vote on account of race or color." *Reno* v. *Bossier Parish School Bd.*, 520 U.S. 471, 485 (1997) (quoting 42 U.S.C. 1973c). This means a covered jurisdiction may not reapportion voting districts in a manner "that would lead to a retrogression in the position of racial minorities. Accordingly, we have adhered to the view that the only 'effect' that violates § 5 is a retrogressive one." *Id.* at 487 (quoting *Beer* v. *United States*, 446 U.S. 130, 141 (1976), and citing *City of Lockhart* v. *United States*, 460 U.S. 125, 134 (1983)).

The Commission and its defenders offer the Justice Department's inscrutability in administering Section 5 preclearance as justification for the Commission "overshooting the mark" and diluting the votes of 3 million Arizona citizens.

In essence the Commission says, "We had no idea how many minority ability-to-elect districts the Justice Department would require to preclear our reapportionment scheme so we created twelve underpopulated districts in the hope that would satisfy the Justice Department and win preclearance."

There were a lot of problems with the Justice Department's preclearance regime before *Shelby County*. As the district court held:

> the state does not know how many benchmark districts the Department believed there were nor how many ability-to-elect districts the Department concluded were in the proposed plan. Nor does it know whether the new plan barely precleared or could have done with fewer ability-to-elect districts.

Harris, J.S.App. 23a.

Prognosticating whether the Justice Department would grant preclearance was an act of juridical divination similar to predicting the future by reading chicken entrails. See Thomas Hobbes, *Leviathan*, Ch. 12. The "former Justice Department officials" admit this point. "[T]he absence of certainty in" obtaining preclearance because "the non-retrogression standard did not offer up a simplistic, formulaic answer to the benchmark question." Br. of Former DOJ Officials, p. 7.

But one point is undisputed. Section 5 does not require the Commission to violate the one-person, one-vote principle. "Preventing retrogression under Section

5 does not require jurisdictions to violate the one-person, one-vote principle." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7472 (Feb. 9, 2011).

But, even more, what the Commission's ill-informed advisor believed the Justice Department would require to preclear the Commission's reapportionment scheme is entirely irrelevant. This Court explained this point in *Miller*, 515 U.S. at 921-22:

> We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues. *** Our presumptive skepticism of all racial classifications prohibits us from accepting on its face the Justice Department's conclusion that racial districting is necessary under the [Voting Rights] Act. *** Were we to accept the Justice Department's objection itself as a compelling interest adequate to insulate racial districting from constitutional review, we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action. *** For the same reasons, we think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Act.[14]

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14. *Miller* was decided in the context of a racial gerrymander challenge to congressional districts but the point quoted above is equally valid in the present context. See *Bossier Parish School*

So, does the bad advice of an ill-informed advisor, even if accepted in "good faith," justify the Commission malapportioning Arizona's state legislature and diluting the votes of close to 3 million Arizona citizens? Under this Court's precedent it does not. This Court emphatically places the focus on the individual Arizona voters – not the Commission.

B. Even if the Voting Rights Act once justified vote dilution, that is no longer so after *Shelby County*.

Even if diluting some disfavored citizens' votes and overweighting the votes of other favored citizens was required to gain preclearance, this justification is no longer valid after this Court's decision in *Shelby County*. Judge Wake explained "even if Section 5 could justify population inequality before *Shelby County*, it cannot now." J.S.App. 125a.

The Commission (and its defenders) justify the malapportioned districts by arguing the Commission had a "good faith" belief that it must under-populate (and overweight the votes) of citizens in twelve districts, and dilute the votes of those in other districts, to obtain preclearance. But this is a misplaced focus. The Equal Protection Clause guarantees the *rights of Arizona voters*. The focus of the Equal Protection Clause is on the right of individuals not the Commission's supposed justification for diluting these individuals' votes.

Bd., 520 U.S. at 483 (declining to "defer to the Attorney General's regulations interpreting the [Voting Rights] Act.").

To be sure, when the Commission reapportioned Arizona's legislature this Court had not yet decided *Shelby County*. But, when the district court reviewed the Commission's redistricting scheme the district court did so in light of *Shelby County*.

Shelby County teaches several lessons. (1) The Voting Rights Act was an "extraordinary" and "exceptional" departure from principles of federalism and state sovereignty. (2) The unique set of circumstances upon which Congress premised the Voting Rights Act's intrusion into state sovereignty were based upon conditions existing a half-century ago. This point is especially relevant to Arizona which Congress swept into the Voting Rights Act preclearance coverage because of an anachronistic English language test Arizona had in 1912 and which Arizona repealed in 1972. Arizona was not part of the Confederacy. Arizona had no Jim Crow laws. And yet Arizona was included in Section 5 preclearance because of how Congress wrote the preclearance formula in 1975. See our opening brief p. 39, n.29.

Because it no longer reflected reality, this Court "declar[ed] § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance." *Shelby County*, 133 S.Ct. at 2631.

To sustain the Commission's malapportionment because *Shelby County* had not been decided when the map was drawn (even though *Shelby County* was decided when the district court reviewed the map) is to ignore this Court's decision. The commission would delay implementation of *Shelby County* until after 2020.

This is akin to saying a segregated "separate but equal" school district is constitutional after *Brown* v. *Bd. of Education*, 347 U.S. 483 (1954), because the school district was segregated before *Brown* when "separate but equal" schools were allowed under *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

C. A parade of horribles will not follow if this Court holds Arizona's state legislature must be equally-apportioned in conformity with the one-person, one-vote principle.

The Commission, and allied *amici*, enrich their argument by claiming a parade of horribles will ensue should this Court not affirm the Commission's malapportioned districts. The Commission claims the Justice Department precleared more than 1,500 other jurisdictions and, if the Court accepts these Arizona voters' argument, every one of these 1,500 other jurisdictions reapportionment plan is invalid and must now be redrawn. AIRC Br. pp. 51-54 and Former DOJ Officials Br. pp. 9-14.

The Commission and its defenders seek succor in decisions (such as *Gaffney* and *Brown*) allowing minor population deviations *incidentally* resulting from the implementation of legitimate and rational state policies. But that is not what exists here. The almost 10% deviation in the Commission's scheme is not an incidental result of the desire to achieve a legitimate state policy. Rather the Commission *intended* to achieve illegitimate ends. The population deviations in the Commission's plan were purposeful and designed to satisfy partisan ends. Since there is nothing "incidental" about the population

deviation present in the plan, the cases allowing incidental population deviations resulting from pursuit of a neutral state policy do not apply.

Thus it does not follow that requiring the Commission to equally-populate Arizona's legislature means that the apportionment of every other jurisdiction that sought Section 5 preclearance is now invalid.

III. Requiring Arizona's legislative districts to be equally-populated does not violate principles of federalism nor does it intrude upon Arizona's sovereignty.

The Commission and the United States claim principles of federalism and state sovereignty require this Court to defer to the Commission's unequal districting scheme. See AIRC Br. pp. 31-32; U.S. Br. pp. 25-29.[15] There are three problems with this argument.

First, invoking federalism and state sovereignty as reasons to justify the Commission's malapportioned legislative districts rests upon an unstated premise

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15. We find it especially ironic the Solicitor General invokes the concept of Arizona's state sovereignty and federalism to defend the Commission's malapportionment. The Solicitor General now says judging Arizona's redistricting process after *Shelby* "contravenes this Court's longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan ***." U.S. Br. p. 34 (internal quotation omitted). Yet in *Shelby County* the Solicitor General argued the opposite. See Brief of Federal Respondent, *Shelby County, Ala.* v. *Holder*, 2013 WL 315242, *13, *19 (2013) ("Congress's legitimate enforcement of those restrictions is no invasion of State sovereignty.") (internal quotation omitted).

that Arizona intended the Commission to unequally populate these districts contrary to the one-person, one-vote principle. But this is not so. Arizona's constitution expressly *forbids* unequally-populated districts. J.S.App. 150a (Ariz. Const. art. 4, pt. 2 § 1(14)(B). The Arizona constitution also forbids the Commission from considering partisanship when drawing its initial map and requires competitive districts.[16] J.S.App. 150a. So, requiring the Commission to equally-populate the legislative districts is merely requiring the Commission to follow Arizona law. There is no conflict between this Court's one-person, one-vote principle as required by the Equal Protection Clause of the United States Constitution and Arizona's state constitution which requires the same thing. There is no dissonance between what the United States Constitution and the Arizona state constitution require the Commission to do – draw equally-populated legislative districts.

Judge Wake noted the foolishness of the argument:

> The first novel thing about this case is that, thanks to the reform of redistricting processes and standards in Arizona, state law itself now excludes most of the traditional pretexts for partisan inequality. Of necessity, the Commission summons up only the Voting Rights Act as redeeming what is otherwise old-fashioned malapportionment. The second thing novel about this case is that, the Arizona voters

16. The Arizona constitution requires the Commission to draw an initial "grid" map with "districts of equal population in a grid-like pattern across the state." J.S.App. 150a (Ariz. Const. art. 4, pt. 2 § 1(14)). The grid map drawn by the Commission had a total population deviation of 4.07%. J.S.App. 19a.

> having cast out that grossest of redistricting abuses, a federal law is now invoked to bless its return.
>
> *Harris*, J.S.App. 144a.

Second, the Equal Protection Clause of the United States Constitution governs this case, and deference is not warranted.

Finally, the Commission is *not* the Arizona legislature. We recognize this Court upheld the Commission's authority to reapportion Arizona's congressional districts against an Election Clause challenge. See *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015). But the Commission *equally-populated* Arizona's congressional districts whereas, here, the Commission did not create equally-populated districts.

The Commission is not granted free-range authority to draw Arizona's legislative districts however it wishes. The Commission is constrained by the specific criteria Arizona's state constitution requires the Commission to follow when it reapportions Arizona's legislature. The Commission was required to draw an initial "grid map" with "districts of equal population in a grid-like pattern across the state." J.S.App. 150a (Ariz. Const. art 4, pt. 2 § 1(14)) and to adjust the Grid Map to comport with the other neutral redistricting criteria.

When the Commission's partisanship, especially the behavior of Chairwoman Mathis, became evident, Arizona's legislature tried to correct the Commission's actions. Arizona's Governor, supported by two-thirds of the Arizona Senate, removed Chairman Mathis for

"substantial neglect of duty and gross misconduct in office," including Mathis' failure "to adjust the grid map as necessary to accommodate all of the goals set forth in Arizona Constitution Art. 4, Pt. 2, § 1(14) ***." *Ariz. Indep. Redistricting Comm'n* v. *Brewer*, 275 P.3d 1267, 1275, 1277 (Ariz. 2012); see also *Ariz. State Legislature*, 135 S. Ct. at 2691. The Arizona Supreme Court overturned this action because "As a matter of law, the Governor cannot base a removal decision on a Commissioner's alleged failure to comply with constitutional map-adjusting criteria before completion and review of the final maps." *Brewer*, 275 P.3d at 1277.

The inability of Arizona's legislature and Governor to remove Chairwoman Mathis for partisan neglect of her duties demonstrates the Commission is politically unaccountable. This point is further demonstrated by the fact that Arizona's Secretary of State, Michele Reagan, represented by Arizona's Attorney General, Mark Brnovich, join the Arizona citizens challenging the Commission and join in the request that this Court overturn the Commission's malapportionment and remand instructing the Commission to reapportion Arizona's state legislature in conformity with the Equal Protection Clause principle of one-person, one-vote and the corresponding provisions of Arizona's state constitution. And, unless this Court acts, the malapportioned districts the Commission drew will remain in effect until after 2020.

Justice Kennedy noted the importance of political accountability as a check in the redistricting process. See our opening brief, p. 56, n.45 (quoting oral argument in *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006)). As the history of this case demonstrates, the Commission is not politically accountable.

CONCLUSION

Deviating from the constitutional command of one-person, one-vote is only permitted when the deviation is minor and necessary to achieve a legitimate and neutral redistricting consideration. This Court has never held partisanship or obtaining Justice Department preclearance justify even "minor" deviations from population equality.

The district court wrongly sustained the Commission's districting scheme even though it deviated from the one-person, one-vote principle by almost 10% and the deviation was not necessary to achieve any legitimate purpose. This Court should vacate the district court's judgment and remand instructing the Commission to apportion Arizona's legislature consistent with the Equal Protection Clause guarantee of one-person, one-vote.

Respectfully submitted,

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WESLEY W. HARRIS, *et al.*,
Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Arizona

REPLY BRIEF OF APPELLEE SECRETARY OF STATE MICHELE REAGAN IN SUPPORT OF APPELLANTS

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STATEMENT

The systematic population deviations in the IRC's plan resulted from the IRC's explicit choice to intentionally under-populate a class of districts based on the race and ethnicity of their residents. The district court found that the IRC believed "*under*populating minority districts" to be "an acceptable tool" in redistricting. JSA 30a (emphasis added). The district court also found that the systematic deviations challenged here were "primarily the result" of the IRC's scheme of "*de*populating minority ability-to-elect districts." JSA 39a (emphasis added). The IRC Commissioners' trial testimony and the hard numbers confirm these findings. The IRC admitted them in its briefing below and on appeal.

The IRC now contends that these systematic population deviations are a mere byproduct of legitimate, neutral redistricting criteria. IRC Br. 2, 48–49. But the court's decision and the record are clear that the IRC decided that these districts *ought* to be *under*-populated. In contrast, under neutral criteria, any given district may as easily fall above as below the ideal population. Deviations, if any, would result from the interplay between the neutral criteria and the state's political and geographic landscape—not from the state's deliberate choice that some districts should be more equal than others. A blanket decision to remove population from a class of districts (rather than remove *or add* as each case may require) is, by definition, not neutral. The IRC's decision was inconsistent with its duty to make a good-faith effort at equality, *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), and it infected the IRC's plan with a "built-in bias" in

favor of minority districts. *Hadley v. Junior College Dist, No. 37*, 397 U.S. 50, 58 (1970).

The IRC's invocation of the Voting Rights Act is a diversion. The one person, one vote principle trumps all other redistricting concerns. That principle forbids rigging deviations in favor of a class of voters or districts. So while the IRC had some flexibility in drawing voting-rights districts (like any other districts), it was forbidden from manipulating population deviations to favor those districts. The United States, as *amicus* supporting the IRC, appears to suggest that the Voting Rights Act trumps the equal-population requirement in this case. Besides misconstruing this Court's racial gerrymandering cases—which allow a Voting Rights Act defense only because a limited use of race in drawing districts is not unconstitutional—the United States' argument runs counter to its advocacy in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 654 (1964), and *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015) ("*ALBC*"). In both cases, the United States was a vigorous proponent of the primacy of the equal-population requirement—against both manipulative districting and the notion that equal population becomes a matter of state discretion once deviations dip below five percent. The Court adopted the United States' position in both cases, and that position—not the view the United States now offers—is the law.

Finally, even if there were permissible bases for distinguishing between citizens for enhanced and diminished representation, race and ethnicity would not be among them. This proposition is so obvious, *see Gray v. Sanders*, 372 U.S. 368, 379 (1963), that it is

remarkable the Court is called on to announce it yet again.

Indeed, this case is a troubling example of how far redistricting can stray from equal protection, even while paying lip service to this Court's standards. The Court should take this opportunity to reaffirm the fundamental requirements of equality under the Constitution, especially as to the sacrosanct nature of citizens' votes. It should reverse the decision below.[1]

ARGUMENT

I. The District Court Found That the IRC Intentionally Under-Populated a Class of Districts, and Its Findings Are Supported by the Record.

The district court found that the deviations in the final 2012 IRC plan resulted from a decision to de-populate the minority districts as a class. JSA 30a, 39a. In fact, the district court believed this was beyond dispute: "The Commission does not argue that the population deviations came about by accident." JSA 5a. The litigation centered on the IRC's "motivation" for de-populating these districts—*i.e.*, whether it was partisan or racial. JSA 5a.

According to the district court, the IRC's draft legislative map "had ten districts identified by the Commission as minority ability-to-elect districts." JSA 28a. The IRC received a statistical analysis from its

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[1] Despite the constitutional harm here, the imminent 2016 elections necessitate relief be delayed until after 2016. *See Reynolds*, 377 U.S. at 585.

expert concluding that minorities would be able to elect their preferred candidates in all ten minority districts. JSA 30a. Subsequently, the IRC decided to "strengthen" this class of districts by "underpopulating" them, along with District 8, which the IRC believed might also qualify as an ability-to-elect district. JSA 30a, 33a. The IRC viewed "underpopulating" these districts as an "acceptable tool" for Section 5 compliance, "so long as the maximum deviation remained within ten percent." JSA 30a.

The resulting inequality was systematic. JSA 11a–12a.[2] Ten of the eleven districts identified as potential minority districts lost population, all of those ten ended up 0.9% or more below the ideal, and six fell at or below the -3.0% floor in the draft map. The districts classified for de-population were Districts 2 (-0.1% to -4.0%), 3 (-1.4% to -4.0%), 4 (0.5% to -4.2%), 7 (-1.3% to -4.7%), 8 (1.5% to -2.2%), 19 (-0.5% to -2.8%), 24 (0.2% to -3.0%), 27 (-2.2% to -4.2%), 29 (-0.4% to -0.9%), and 30 (-2.4% to -2.5%). Secretary Br. 10–12. The final minority district (District 26) was drawn a smidgen above the ideal. *Id.* Other districts, receiving population from the minority districts, rose above the ideal, *see* JSA 9a–10a, resulting in "an increase in population inequality." JSA 32a. None of this "came about by accident." JSA 5a.[3] The district court found

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[2] Some commissioners expressed concern about this course of action, but it was implemented nonetheless. JSA 39a–40a.

[3] Because the IRC selected Hispanic districts, which have below-average voter eligibility, the differences here are exacerbated under the metric of voting strength. Under the rubric of citizen voting age population, the deviations run from 28.98% below the

that "the additional population deviation in these ten districts between the passage of the draft map and the final map were primarily the result of efforts to obtain preclearance"—namely, the decision to "further depopulat[e] minority ability-to-elect districts." JSA 39a.

The court's holding that the deviations were caused by a decision to under-populate finds ample support in the record. The IRC commissioners freely admitted this fact at trial. Trial Tr. 328 (Commissioner Stertz) (admitting that the IRC "received advice from counsel . . that it was okay to underpopulate districts"); Trial Tr. 329 (Commissioner Stertz) ("Q: Okay The notion of underpopulating districts was yours; true? A: True."); Trial Tr. 871-72 (Commissioner Freeman) (agreeing that "[f]rom November 29, 2011, until final adoption, the Commission went through a process in which it actually depopulated minority districts"). And the Commissioners' testimony was unmistakable that the decision to under-populate was the cause of the inequality:

> JUDGE WAKE: One last question: It appears just looking at the numbers [and] from what we have heard that there was a decision to underpopulate the Voting Rights Act districts and that that is what necessarily drove the overpopulation of other districts.
>
> THE WITNESS: Yes. That's absolutely correct.

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ideal to 25.83% above the ideal, for a total deviation of 54.81%. JSA 243a–244a.

> JUDGE WAKE: And was there any other reason that drove the overpopulation of the overpopulated districts?
>
> THE WITNESS: The only other thing that I can think of is that -- well, no, not really.

Trial Tr. 820 (Commissioner McNulty);[4] *see also* Trial Tr. 1071–72 (Commissioner Mathis) (admitting that "the majority-minority districts, were underpopulated" precisely "because" the IRC "received advice . that that was okay to do").

Some testimony referenced partisan tension arising from this strategy. Trial Tr. 181 (Commissioner Stertz) (testifying that the IRC was "hyper-packing districts of Republicans in an effort to actually marginalize and create an overpopulated district of Republicans in an effort to give the ability to elect in an underpopulated district"); Trial Tr. 882–83 (Commissioner Freeman) (testifying that "we had the advice, well, you can always improve the metrics and one way to do it is to depopulate these districts" and that, when the advice was questioned, Commissioner Herrera "said, basically 'Too bad. That's what we're going to do.'"). And while the IRC denies any partisan motivation, there is not a single suggestion in the record that the IRC did not depopulate these districts. To the contrary, this fact was reiterated over and over again, as Judge Clifton observed: "we have heard repeatedly the advice

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[4] Commissioner McNulty offered additional ambiguous testimony concerning a single other factor that may have affected the deviation in one district. Trial Tr. 820. The district court was well within its discretion not to credit this as the cause the inequality endemic in all districts.

received with regard to voting rights districts and the ability to underpopulate those districts." Trial Tr. 822. And there was testimony that population deviations did *not* result from redistricting goals such as creating competitive districts. Trial Tr. 820 (Commissioner McNulty) ("[W]e wouldn't have used population deviations to achieve competitiveness. We simply would not have done that.").

The IRC admitted in its trial briefing that a class of districts was selected for under-population and that this caused the systematic deviations:

> Mr. Adelson and other Commission counsel advised that underpopulating voting rights districts to help comply with Section 5 was common practice. . . Consequently, in the final map, nine of the ten districts that the Commission created as ability-to-elect districts to receive preclearance were below the ideal population for a legislative district.

IRC Pre-Trial Br. 12, ECF No. 219. The IRC repeated this factual assertion to this Court in requesting dismissal of this appeal:

> [T]he Commission understood that modest underpopulation of ability-to-elect districts was commonly done in other jurisdictions. To underpopulate an ability-to-elect district and thereby strengthen a minority's ability to elect candidates of its choice, the consequence often would be to remove population from districts that had a higher proportion of voters who were registered Democrats.

MTD 12–13. Consistent with the IRC's testimony and admissions, the district court found that a deliberate decision to under-populate minority districts was the cause of the systematic inequality. JSA 30a, 39a–40a. It likely would have committed clear error in finding otherwise.

The IRC provides no basis for revisiting the district court's findings. Contrary to these previously undisputed findings of fact, the IRC now claims that the district court identified "traditional state redistricting objectives" as a partial cause of the deviations. IRC Br. 2. But the IRC fails to identify a single finding of this nature in the decision.[5] The IRC also fails to explain how these traditional redistricting goals could have caused every minority district save one to fall below the ideal. IRC Br. 15–16, 49; *see also Larios v. Cox*, 300 F. Supp. 2d 1320, 1350 (N.D. Ga. 2004) *aff'd*, 542 U.S. 947 (2004) (holding that "the record evidence squarely forecloses the idea that *any* of these legitimate reasons could account for the deviations") (emphasis in original). As the IRC itself notes, pursuing traditional redistricting goals both "removed population" and "added population." IRC Br. 16. Thus, unlike the IRC's explicit choice to under-populate, these traditional redistricting goals cannot

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[5] The IRC cites JSA 24a and JSA 36a, *see* IRC Br. 38; yet neither reference supports the IRC. At JSA 24a, the district court states only that: "Although the Commission considered and often adjusted lines to meet other goals, it put a priority on compliance with the Voting Rights Act." This does not link the systematic deviations to those "other goals." Similarly, at JSA 36a, the district court makes no reference to redistricting goals other than the Voting Rights Act and partisanship.

explain the systematic inequality in the IRC's final plan.[6] In contrast, choosing to under-populate minority districts, by definition, only removed and never added population. *See* JSA 166a (Commissioner Stertz).

The IRC also asserts—again, with no support in the district court's decision—that, on December 16, 2011, it took steps to minimize population deviations. IRC Br. 18. But these steps applied to districts "other than the voting rights district[s]." MTD App. 35. Thus, the districts the IRC suggests were nudged closer to the ideal—Districts 1, 6, 9, 14, 16, and 25, IRC Br. 18 & n.16—are not the minority districts that were systematically under-populated. This course of action served to reinforce, rather than eradicate, the built-in bias in favor of the minority districts.

Ultimately, the IRC's factual contentions—aside from having no basis in the findings below—are a smoke screen. They show merely that the IRC made other redistricting choices in addition to the decision to

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[6] For instance, the IRC mentions alterations to District 2, but they occurred on December 19, 2011—*after* the decision to de-populate minority districts was ratified and executed. IRC Br. 16 (citing Trial Ex. 405). District 2 was over 4.0% below the ideal population prior to those changes, and the changes did little to the deviation. *See* Trial Ex. 405 at 92. Likewise, the testimony concerning Districts 29 and 30 represented merely that the changes the IRC references "would have affected population in some manner." Trial Tr. 786 (Commissioner McNulty) (cited at IRC Br. 17). And the testimony on alterations to District 7 is ambiguous, to say the least. *See* Trial Tr. 820 (Commissioner McNulty) (testifying that "some moving of some population" may have been unrelated to "underpopulating" the district pursuant to the advice to under-populate). None of this provides a basis for second-guessing the district court's findings.

de-populate the minority districts. Yet that latter decision ensured that, regardless of whatever else was transpiring in the redistricting process, the minority districts would end up on the low end of the overall deviation. The district court did not err in finding that it was the decision to de-populate, and not some other decision, that caused the systematic inequality.

II. The IRC's Deliberate Under-Population of Minority Districts Violates Equal Protection.

The relevant facts are indisputable, and they show that the IRC violated the Equal Protection Clause. The Equal Protection Clause requires an honest effort at equality The IRC made a deliberate effort at *in*equality. The Equal Protection Clause forbids built-in bias in favor of certain districts. The IRC made the deliberate choice to favor the minority districts. The IRC's contentions notwithstanding, this course of action was not required. In fact, it was not even helpful in creating strong ability-to-elect districts: the IRC's blanket under-population weakened many of the minority districts.

Even if the Voting Rights Act required enhanced representation for minority districts—it does not—a requirement of this nature would be unconstitutional. The IRC does not seriously contest this point. But the United States, contrary to decades of precedent and its own positions taken in developing that precedent, suggests that the Voting Rights Act may trump the one person, one vote rule. This argument is backwards. And it finds no support in the Court's racial gerrymandering precedent, which allows a defense in those situations where the Constitution permits a

limited use of race in redistricting. Violations of the one person, one vote rule are altogether different and cannot be justified by reference to the Voting Rights Act.

A. Under-Populating Districts Violates the One Person, One Vote Rule.

A state must "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577 The IRC determined that it would under-populate a class of districts. That is the very opposite of trying to make them equal. The IRC claims that this was not actually a decision calculated to produce inequality IRC Br. 48. But it fails to answer the obvious question: what else could have been the objective of under-populating a class of districts, JSA 30a, other than that they be, in fact, *under*-populated?

This choice infected the plan with more than a "taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). While the IRC disclaims any discriminatory intent and trumpets the district court's references to "good faith," IRC Br. 49–50, the decision to under-populate a class of districts, again, speaks for itself.[7] That decision falls on the wrong side of the Court's decision in *Hadley*, 397 U.S. at 57–58, which clarified the difference between

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[7] In finding "good faith," the court clearly understood the IRC to be sincere in its belief that under-populating districts would be helpful in the preclearance process and found that this was not a pretext for partisanship. *See* JSA 35a–42a. But sincerity on that point bears no relation to the standards enunciated in *Reynolds* and *Hadley*.

neutral and discriminatory districting. *Hadley* condemned a redistricting formula under which an identifiable class of districts (large districts) "may frequently have less effective voting power than" others but "can never have more." 397 U.S. at 57–58. The *Hadley* Court contrasted that formula to deviations resulting from "inherent mathematical complications" of the districting scheme and "did not contain a built-in bias in favor of small districts." *Id.* In choosing to under-populate the minority districts as a class, the IRC ensured that they would fall at or below the ideal, not noticeably above it. JSA 30a, 39a. Deviations cannot be neutral if they are the result of a one-way ratchet.[8]

Hadley therefore refutes the IRC's claim that "there is no constitutionally significant difference" between its decision to under-populate and redistricting goals, neutrally applied, such as honoring city and county boundaries or retaining district cores. IRC Br. 49–50. The decision, for instance, to honor political subdivisions, does not require that any district—much less a class of districts—must fall on one side or the other of mathematical equality. Any deviations will be

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[8] Where the ten-percent rule articulated in *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983), provides a burden-shifting framework for evidence based on the overall magnitude of population deviation, intentional under-population is a distinct form of invidious discrimination in redistricting. *See Roman*, 377 U.S. at 710; *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment"); *Abate v. Mundt*, 403 U.S. 182, 185–86 (1971) ("In this case there is no suggestion that the Rockland County plan was designed to favor particular groups.").

incidental, occurring by happenstance from inherent complications of a state's criteria and its geographic and political landscape. These types of incidental deviations are therefore not, as the IRC suggests, similar to the IRC's intentional decision to de-populate a specific class of districts. *See* IRC Br. 50 n.30.

For the same reason, the IRC's blanket decision to under-populate did not, as the IRC claims, fall within its "flexibility" to make "sovereign choices" in redistricting. *See* IRC Br. 48, 50. Under *Hadley*, the IRC's flexibility extended only to deviations from inherent complications of its criteria. It did not allow the IRC to rig deviations in favor of certain districts. *See also WMCA*, 377 U.S. at 654; *Abate v. Mundt*, 403 U.S. 182, 185 (1971); *Roman*, 377 U.S. at 710; *Larios*, 300 F. Supp. 2d at 1343. A state may undertake any number of actions based on any number of considerations, be they geographic, political, partisan, or (within limits) racial. But the state must remain strictly neutral as to the weight of citizens' votes. *See Bush v. Gore*, 531 U.S. 98, 104–05 (2000) ("[T]he State may not . value one person's vote over that of another."). The IRC's effort to under-populate a class of districts was not neutral.

Moreover, nothing about the IRC's stated goals, including Voting Rights Act compliance, required a departure from neutrality. As the United States acknowledges, if the IRC needed to increase the percentage of minority population in the minority districts, it could have as easily "move[d] in population that might enable the minority group to elect its preferred candidates"—and thereby *increased* total population in a given district—as it could have

"move[d] out population that might preclude the ability to elect"—and thereby reduced total population. U.S. Br. 30–31. The IRC also could have done some of both, thereby increasing minority population while keeping total population steady. This course of action, conducted neutrally, would have entailed an analysis of each district and a decision to adjust the district—using all available tools—as necessary to attain a certain minority percentage.[9]

Instead, with addition, subtraction, and a combination of both available as options to "strengthen" the districts, the IRC decided, in advance of district-specific considerations, only to subtract. JSA 166a (Commissioner Stertz). When weighing the advice to de-populate uniformly across districts, Commissioner Mathis inquired whether this advice referred to adjusting the percentage of minority population within the minority districts, and the IRC's counsel clarified that the concepts are separate. Trial Ex. 395 at 115.

Indeed, they are. The blanket decision to under-populate did not improve minority voting strength in all districts. The percentage of minority voting-age population plummeted in District 2 (61.4% to 52.8%), fell in Districts 3 (51.2% to 50.1%), and 27 (53.7% to 52.1%), and remained exactly the same in District 30 (50.7%). *See* Trial Ex. 69. At trial, Judge Wake

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[9] Notably, Arizona "experienced significant growth in its Hispanic population" between the 2000 and 2010 censuses, so there were more minority residents available in 2012 for the *same number* of ability-to-elect districts as compared to the benchmark plan. IRC Br. 6.

observed that "the majority of" a series of changes made in the course of de-populating minority districts "reduced the Hispanic voting age population for the districts," and Commissioner Stertz testified that this occurred. JSA 164a. When asked how removing minority voters from minority districts "strengthen[s]" them as minority districts, Commissioner Stertz conceded that the IRC ratified this course of action "on faith." JSA 166a–167a. In fact, the decision to de-populate did "strengthen" the minority districts in a different manner: it enhanced those districts' representation and voting strength at the expense of other districts. And that is precisely the type of inequality this Court's precedent forbids.

B. The Voting Rights Act Does Not Justify Unconstitutional Districting.

The IRC and the United States contend that the Voting Rights Act can justify deviations from equality. IRC Br. 41–44; U.S. Br. 25–32. It may justify deviations from mathematical equality, but it cannot justify departures from *equal protection*. To be consistent with equal protection, a state's decisions about how to comply with the Voting Rights Act must be made in the course of a good-faith effort at equality and therefore must be free from a "built-in bias" in favor of certain districts.[10] *Hadley*, 397 U.S. at 58.

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[10] The same rule supersedes state criteria. If a state manipulates population deviations in the name of its traditional criteria—such as by under-populating rural districts in the name of communities of interest or under-populating the districts of favored incumbents in the name of "incumbency protection"—it violates equal protection for the same reason that under-populating districts in the name of the Voting Rights Act violates equal protection. *See*

Otherwise, those decisions violate the Constitution and cannot be justified by a statute. For the reasons discussed above, good faith and neutrality are incompatible with a blanket decision to under-populate. That should end the matter.

The United States, however, pushes the argument further, suggesting that even biased districting can be justified by the Voting Rights Act. U.S. Br. 31 n.12. It fails to cite, much less confront, the Court's precedent forbidding biased redistricting, such as *Hadley* and *WMCA*, 377 U.S. at 654. That is perplexing given that the United States, as an *amicus* in *WMCA*, proposed that deviations resulting from "a built-in, discriminatory mechanism" in favor of some districts violate equal protection. Brief for the United States as Amicus Curiae, *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1963) (No. 20), 1963 WL 105658, at *18. The Court agreed and rejected a districting scheme designed to under-represent urban districts. *See WMCA*, 377 U.S. at 654–55.

Additionally, the United States' view runs contrary to the Court's holding last term that the "equal population goal is not one factor among others" in redistricting, but rather is "a background rule against which redistricting takes place." *ALBC*, 135 S. Ct. at 1270–71. The Court in *ALBC* declined to view the state's "efforts to create districts of approximately equal population" as falling "in the balance" with other districting goals—even where the state attempted to keep deviations within plus or minus one percent of the

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Secretary Br. 32–34. The Secretary's position therefore does not place the Voting Rights Act below state criteria.

ideal. *Id.* In other words, the Court in *ALBC* did not view five percent as the mark below which the equal-population goal ceases to be a federal mandate and becomes a state prerogative to be balanced and traded with other goals.

The United States, participating as an *amicus*, formulated and advanced that view. While acknowledging that the legislature attempted to keep deviations below two percent, the United States argued that the state's equal-population decisions were not discretionary but were mandated by a constitutional obligation that "trumps other districting objectives in *every* decennial redistricting." Brief for the United States as Amicus Curiae, *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015) (No. 13-895), 2014 WL 4101232, at *18 (emphasis in original). This argument was sound, given the constitutional requirement that a state "make an honest and good faith effort" at equality—even below five percent. *Reynolds*, 377 U.S. at 577.

Now, rather than explain why intentionally drawing unequal districts does not offend the equal-population goal that "trumps other districting objectives," the United States suggests that the Voting Rights Act can trump equal protection. *See* U.S. Br. 31 n.12. That, of course, runs contrary to the most fundamental principles of constitutional law. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

The United States relies on the Court's decisions citing the Voting Rights Act as a potential defense to charges of racial gerrymandering. U.S. Br. 25–26, 31 n.12. This reliance neglects the difference between violations of the one person, one vote rule, which are

always unconstitutional, and the use of race in redistricting, which is sometimes permissible. A limited use of race can be justified by the Voting Rights Act only because "[i]mplicit in" the Court's decisions applying the Voting Rights Act to redistricting "is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving majorities [of racial minorities] in particular districts."[11] *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 161 (1977) ("*UJO*") (discussing, *inter alia*, *Beer v. United States*, 425 U.S. 130 (1976), and *City of Richmond v. United States*, 422 U.S. 358 (1975)). But only measures tailored to a "constitutional reading and application" of the Voting Rights Act justify the use of race in redistricting. *Miller v. Johnson*, 515 U.S. 900, 911, 921 (1995) (rejecting a Section 5 defense where the state's use of race amounted to "segregat[ing]" citizens by race, in violation of equal protection). Any other reading brings the Voting Rights Act "into tension with the Fourteenth Amendment." *Id.* at 927. That is because even a legitimate end does not justify means that are not permissible. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

In contrast to this limited use of race in redistricting, there is nothing even implicit in the Court's Voting Rights Act or equal protection jurisprudence that permits enhancing the voting and representation of ability-to-elect districts as compared to other districts. To the contrary, the Court rejected

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[11] The Court has continued to interpret the Voting Rights Act to require drawing minority districts at percentage thresholds. *See Bartlett v. Strickland*, 556 U.S. 1 (2009).

this type of action as a "means" appropriate for "the protection of minorities." *Reynolds*, 377 U.S. at 566. Thus, however availing the Voting Rights Act may be in defense of a state's limited use of race in drawing ability-to-elect districts, it has no role in justifying the decision to intentionally manipulate the value of individual votes.

Even if the Voting Rights Act could, in some situations, provide a defense, that defense would not extend to all actions stemming from the "desire to obtain preclearance under Section 5." *See, e.g.*, IRC Br. 41. The Court has flatly rejected the notion "that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Miller*, 515 U.S. at 921–22. The correct focus is not on what the IRC believed "was required in order to obtain preclearance," but rather on what "was required by the substantive provisions of the Act." *Id.* at 922.

Neither the IRC nor any of its *amici* explain how under-populating the minority districts had anything to do with the "substantive provisions" of the Voting Rights Act—let alone how it was "required." *Id.* Section 5 of the Voting Rights Act prohibits changes in voting laws that have "the effect of diminishing" the ability of minorities to elect their preferred candidates, but it does not promise enhanced voting strength. 52 U.S.C. § 10304(b).[12] There was therefore neither a

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[12] Section 2, which serves a similar purpose as Section 5, also does not promise enhanced voting strength and expressly disclaims any contrary interpretation. 52 U.S.C. § 10301(b).

requirement of, nor advantage to, blanket under-population.

The IRC and its *amici* complain that the IRC was unsure how many minority districts to draw or how high the minority percentages should be. But the process was at least transparent enough for the IRC to know that the requisite course of action was "creating or preserving" high percentages of Hispanics or Native Americans "in particular districts." *See UJO*, 430 U.S. at 161; *see also* IRC Br. 9–10; Former DOJ Amici Br. 29 (observing that the "critical question" concerns the "number of ability-to-elect districts" required). There was never a reason to fear that the minority districts might have too many residents in terms of total population. As described above, these concepts are separate, the IRC was explicitly advised that they are separate, and the IRC's blanket decision to under-populate at times *conflicted* with the legitimate objective of creating or preserving high percentages of minorities in the ability-to-elect districts. The Voting Rights Act cannot justify a course of action entirely unrelated to its requirements.

III. The IRC's Use of Race Was Impermissible.

The arguments made above are sufficient for reversal. Because there is no classification by which a state may intentionally give some citizens more valuable votes than others, it hardly matters what classification a state chooses for this distinction. *Reynolds*, 377 U.S. at 565–66. But if there were any doubt on that point as a general matter, the IRC's choice of race and ethnicity as its classification provides all the clarity that is needed in this case. This Court in both *Gray*, 372 U.S. at 379, and *Reynolds*, 377 U.S. at 565–66, ruled out race as a characteristic by which to

distinguish citizens for enhanced and diluted representation.

The IRC claims it did not distinguish between citizens and districts on the basis of race because its "focus was Section 5 preclearance." IRC Br. 51. But Section 5 forbids retrogression of voting strength "on account of race or color," 52 U.S.C. § 10304(a), and the IRC created "ability-to-elect" districts in the only manner possible: by identifying "concentrations of minority populations," JSA 33a; *see also* JSA 21a. As discussed above, this was permissible. The IRC, however, decided that the ability-to-elect districts, besides having requisite levels of minority population, would *also* be the under-populated districts. It thus extended its use of race and ethnicity, using these identifiers to select districts for enhanced representation. The involvement of Section 5 did not somehow render that decision non-racial. *See Miller*, 515 U.S. at 907 (classifying state's efforts to comply with DOJ demands as racial).

The IRC further contends that the Court is powerless to remedy the IRC's use of race because a racial gerrymandering claim provides the only cause of action. IRC Br. 46 n. 27, 51. That is not true. "*Any* preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986) (quotation marks omitted) (emphasis added). Enhancing the power of votes, the "fundamental political right" that is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), is certainly a preference.

This preference is not "racial gerrymandering," as recognized in *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (*"Shaw I"*). *Shaw I* applies the reasoning of *Brown v. Board of Education* to redistricting schemes designed "to segregate the races for purposes of voting." 509 U.S. at 642–44. But *Shaw I* was controversial because of the arguable *absence* of a tangible race-based preference: "the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others." *Id.* at 681–82 (Souter, J., dissenting); *see also id.* at 659 (White, J., dissenting). The *Shaw I* dissents asserted that, "without more," the creation of majority-minority districts—even bizarre districts—causes no injury because doing so does not "diminish the effectiveness of the individual as a voter." *See, e.g., id.* at 682 (Souter, J., dissenting).

But where a redistricting plan does, in fact, "diminish the effectiveness of the individual as a voter," the case is even easier. Voting preferences that "advantage . . . one person . at the obvious expense of a member of a different race," *id.* at 681 (Souter, J., dissenting), far from being permitted by *Shaw I*, present an even more obvious case of discrimination, as recognized under *Gray*, 372 U.S. at 379, and *Reynolds*, 377 U.S. at 565–66.

Thus, unlike a *Shaw I* racial gerrymandering claim, there is an obvious race-based preference here: the IRC increased the value of some votes and decreased the value of others based on race. The racial gerrymandering test that allows the use of race to a limited degree in redistricting, *see Miller*, 515 U.S. at 916, thus does not apply Instead, this case falls under the Court's decisions forbidding "[r]acial and ethnic

distinctions of *any sort*." *Univ. of Ca. Regents v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.) (emphasis added). So while the IRC is correct that there is a difference between this case and a racial gerrymandering case, that difference cuts against the IRC.

Analyzing the IRC's race-based under-population need not detain the Court for long because, as described above at II.B, there is no compelling basis for the IRC's actions. And, even assuming a compelling interest, the IRC's intentional under-population of districts based on race and ethnicity is not narrowly tailored. Where Section 5 is the asserted compelling interest, a plan "would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655. In fact, the IRC's actions were entirely unrelated to the requirements of the Voting Rights Act. *See supra* II.B. The IRC's intentionally overbroad use of race was therefore not narrowly tailored to meet any legitimate goal.

CONCLUSION

For these reasons and those stated in the Secretary's opening brief, the district court should be reversed and the case remanded for appropriate relief.

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No. 14-232

In the Supreme Court of the United States

WESLEY W. HARRIS, ET AL., APPELLANTS

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE ARIZONA INDEPENDENT REDISTRICTING COMMISSION

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QUESTION PRESENTED

Whether the district court correctly rejected appellants' Equal Protection Clause challenge to Arizona's redistricting plan.

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In the Supreme Court of the United States

No. 14-232

WESLEY W. HARRIS, ET AL., APPELLANTS

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE ARIZONA INDEPENDENT REDISTRICTING COMMISSION

INTEREST OF THE UNITED STATES

This case involves a claim that population deviations in Arizona's 2012 legislative redistricting plan violate the Equal Protection Clause. The United States participated as *amicus curiae* in this Court's cases analyzing the constitutionality of malapportioned state legislative districts. *E.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186 (1962). In addition, the United States, through the Attorney General, has primary responsibility for enforcing the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.* At the time of the redistricting decisions in this case, the United States was responsible for reviewing voting changes in jurisdictions, including Arizona, that were subject to Section 5 of the VRA. 52 U.S.C. 10303, 10304. The United States accordingly has a substantial interest in this case.

STATEMENT

1. Drawing legislative districts is a quintessential state sovereign function. *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995). States therefore have considerable discretion to engage in the balancing and compromises inherent in the districting process—subject to the requirements of the Constitution and federal law. *Ibid.*

As relevant here, the Equal Protection Clause requires States to draw legislative districts that are substantially equal in population. *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964). The VRA imposes additional obligations. When the map challenged here was drawn and implemented, Section 5 of the VRA required certain jurisdictions identified through Section 4 to secure preclearance of changes to electoral practices, including districting changes. 52 U.S.C. 10303(b), 10304(a).

To obtain preclearance, a covered jurisdiction must demonstrate that a proposed change does not have the purpose or effect of discriminating based on race. 52 U.S.C. 10304(a). A districting change cannot receive preclearance, for example, if it results in retrogression by diminishing a minority group's ability "to elect [its] preferred candidates." 52 U.S.C. 10304(b). To determine whether a redistricting plan is retrogressive, the new voting plan is compared against the existing, or "benchmark," plan, using updated census data in each and conducting a functional analysis focusing on whether the proposed plan maintains a minority group's ability to elect. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) (*2011 Guidance*). A proposed plan with fewer minori-

ty ability-to-elect districts than the benchmark plan is generally impermissibly retrogressive, unless retrogression is unavoidable. 52 U.S.C. 10304(b) and (d).

2. Arizona's bicameral legislature is divided into 30 legislative districts, each of which elects one member of the Senate and two members of the House of Representatives. Ariz. Const. Art. 4, Pt. 2, § 1, ¶ 1. The Arizona Constitution vests redistricting responsibility in a five-member independent commission known as the Arizona Independent Redistricting Commission (AIRC or Commission). *Id.* ¶¶ 3-8.

Each decade, the leadership of the two main political parties in the state legislature take turns selecting the first four Commission members, who may be affiliated with a political party; those four members then select an individual not affiliated with any party already represented on the Commission to serve as the Commission's chair. Ariz. Const. Art. 4, Pt. 2, § 1, ¶¶ 5-6, 8. The Commission starts the redistricting process by creating "districts of equal population in a grid-like pattern across the state." *Id.* ¶ 14. The Commission then adjusts the grid "as necessary" to comply with the federal Constitution and the VRA. *Id.* ¶ 14(A). "To the extent practicable," the Commission must also pursue five goals: (1) population equality; (2) geographic compactness and contiguity; (3) respect for communities of interest; (4) respect for locality boundaries, visible geographic features, and undivided census tracts; and (5) competitive districts, if creating them does not significantly impede the other goals. *Id.* ¶ 14(B)-(F).

3. Following the 2010 census, the AIRC was established and began the redistricting process. At that time, Arizona was required to comply with Section 5 of

the VRA, and the Commission accordingly prioritized avoiding retrogression among its districting goals. J.S. App. 19a-20a, 23a-24a.[1] In accordance with its counsel's and consultants' advice, the Commission determined that there were likely ten minority ability-to-elect districts in the benchmark plan. *Id.* at 27a-28a. The Commission therefore aimed to create ten corresponding districts in the new plan to avoid retrogression and achieve preclearance. *Ibid.*

The Commission adopted a draft map in October 2011, which contained ten districts it believed might qualify as minority ability-to-elect districts. J.S. App. 28a-30a. The Commission's counsel subsequently urged additional steps to ensure minority groups could elect their preferred candidates in those districts to reduce the risk that the plan might be deemed retrogressive. *Id.* at 30a. Many of the potential ability-to-elect districts in the draft map were already slightly underpopulated, but counsel advised that such variances were a permissible byproduct of efforts to comply with the VRA, "so long as the maximum deviation remained within ten percent." *Ibid.* The Commission ultimately adopted several changes that, among other things, increased the percentage of Hispanics in two potential ability-to-elect districts, with a resulting minor increase in population deviations. *Id.* at 31a-32a (summarizing that one district increased from 0.1% to 0.3% above the ideal population, while the other decreased from 0.2% above to 3% below).

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[1] In *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), this Court held that the coverage formula in Section 4(b) of the VRA could no longer be used to require preclearance under Section 5. *Id.* at 2631. Thus, Arizona is not currently subject to Section 5.

In addition, a Democratic commissioner explored possibilities for making District 8, which was Republican-leaning, more competitive. J.S. App. 32a-33a. Although the Commission had not previously counted District 8 as an ability-to-elect district, counsel suggested it might qualify as one if lines were shifted to keep communities with high minority populations together, which would enhance the case for VRA compliance if another potential ability-to-elect district were found not to qualify. *Ibid.* The Commission subsequently voted 3-2 to implement that change, with Republican commissioners voting against—the only alteration to the draft map that resulted in a divided vote. *Id.* at 33a-34a. The modification had a slight effect on the population counts in District 8 and three other districts. *Id.* at 34a (summarizing that the changes increased deviations by 0.7%, 1.4%, and 2.4% in three districts, and decreased one district's deviation by 1.6%). Although the change increased the percentage of Hispanics in District 8, the AIRC ultimately concluded that it did not qualify as an ability-to-elect district. *Ibid.*

In January 2012, the AIRC approved the final map in a 3-2 vote, with the Republican commissioners voting against it. J.S. App. 35a. In April 2012, the Attorney General precleared the plan under Section 5. *Ibid.* The first election cycle using the map occurred later that year. *Id.* at 9a-11a.

Each legislative district in the final map has a minor population deviation from the ideal, with 12 underpopulated and 18 overpopulated. J.S. App. 9a-10a. The maximum deviation is 8.8% and the average variance is 2.2%. *Id.* at 12a; Supp. App. 15a. Nine of the 12 underpopulated districts were viewed by the Com-

mission as ability-to-elect districts, and each elected only Democrats to the state legislature in 2012. J.S. App. 9a-10a. Of the remaining three underpopulated districts, one elected only Republicans, one elected only Democrats, and one elected both Republicans and Democrats. *Ibid.* Of the 18 overpopulated districts, one was viewed as an ability-to-elect district, and it elected only Democrats. *Ibid.* Of the remaining 17 overpopulated districts, 15 elected only Republicans and two elected both Republicans and Democrats. *Ibid.* In total, Republicans won 56.6% of state senate seats and 60% of state house seats in 2012, which exceeded the Republican Party's statewide registration share of 54.4%. *Id.* at 98a (Silver, J., concurring in relevant part).

4. Appellants are Arizona voters who brought this suit to challenge the state legislative plan, asserting that "the Commission underpopulated Democrat-leaning districts and overpopulated Republican-leaning districts for partisan reasons, in violation of" the Equal Protection Clause. J.S. App. 3a-4a.

a. Following a bench trial, a three-judge district court rejected appellants' equal protection claim. J.S. App. 3a-81a.

At the outset, the district court recognized that the Constitution does not require state legislative districts of perfectly equal population; rather, "[s]ome deviation * * * is constitutionally permissible" if "the disparities are based on 'legitimate considerations incident to the effectuation of a rational state policy.'" J.S. App. 60a-61a (quoting *Reynolds*, 377 U.S. at 579). Because the overall deviation was under 10% and therefore qualified as minor under this Court's precedents, the court observed that the disparities them-

selves did not "make out a prima facie case of discrimination." *Id.* at 61a. Appellants accordingly bore the burden "to prove that the deviations did not result from the effectuation of legitimate redistricting policies." *Ibid.*

The district court held that appellants failed to carry that burden. In particular, appellants did not prove "that the Commission deviated from perfect population equality out of a desire to increase the electoral prospects of Democrats at the expense of Republicans," which the court assumed without deciding would not be a valid justification for minor disparities. J.S. App. 62a. The court observed that the pattern of population disparities correlated not only with party affiliation but also with efforts to create minority ability-to-elect districts. As between those two explanations, it made a factual finding that "the population deviations were primarily a result of good-faith efforts to comply with the [VRA]." *Id.* at 4a, 36a-42a, 75a. Thus, while the court found that "some of the commissioners were motivated in part in some of the line-drawing decisions by a desire to improve Democratic prospects in the affected districts," it determined that "compliance with federal voting rights law was the predominant reason for the deviations." *Id.* at 6a.

The district court further concluded that VRA compliance was "a legitimate justification for [the] minor population deviations." J.S. App. 72a. The court could discern no reason why VRA compliance would not qualify as "a legitimate, rational state policy on par with" other districting goals, "such as avoiding contests between incumbents and respecting municipal lines," which can justify comparable disparities. *Id.* at 65a, 67a. Nor was that conclusion altered by

Shelby County v. *Holder*, 133 S. Ct. 2612 (2013), "which was decided after the legislative map in question here was drawn and implemented." J.S. App. 69a. The court observed that States should "comply with federal voting rights law as it stands at the time rather than attempt to predict future legal developments and selectively comply with voting rights law in accordance with their predictions." *Id.* at 72a. Moreover, *Shelby County* invalidated only Section 4(b)'s coverage formula and did not "hold that any effort by a state to comply with Section 5 was improper." *Ibid.*

b. Judge Silver concurred in relevant part. J.S. App. 82a-104a. She would have required appellants to show that "partisanship was the *actual* and *sole* reason for the population deviations," which they could not do in light of the "overwhelming" evidence that "the final map was a product of the commissioners'[] consideration of appropriate redistricting criteria." *Id.* at 93a-94a, 99a-100a. She also expressed doubt that "minor population deviations due to partisanship present a cognizable Equal Protection claim." *Id.* at 93a. If "maps containing minor deviations can be challenged as attempts to give one political party an electoral advantage," she cautioned, "the federal courts should prepare to be deluged with challenges to almost every redistricting map." *Ibid.*

c. Judge Wake dissented in relevant part. J.S. App. 105a-145a. Although he agreed with the majority that "[c]omplying with Section 5 and obtaining preclearance under the [VRA] was a legitimate objective" when the Commission adopted the map, he did not believe such compliance could justify what he viewed as "systematic population inequality," especially after *Shelby County*. *Id.* at 126a, 128a.

SUMMARY OF ARGUMENT

The Equal Protection Clause requires that state legislative districts be apportioned on a population basis, but does not demand perfect mathematical equality in subordination of other traditional districting goals. To provide States with flexibility to pursue rational and legitimate districting policies within the bounds of substantial population equality, this Court's precedents establish a strong presumption that plans with deviations under 10% are constitutional. Appellants failed to overcome that presumption, and the district court thus correctly rejected their equal protection claim.

A. Because the population deviations in Arizona's redistricting plan are minor, appellants bore an initial burden of producing evidence sufficient to infer that the deviations resulted from invidious discrimination. To make out a prima facie case, appellants needed to come forward with evidence to negate the presumption that the population deviations were the byproduct of legitimate districting criteria. That burden is appropriately high to ensure that States retain leeway to pursue legitimate districting policies and to ensure that federal courts are not entangled in state redistricting as a matter of course. When the alleged infirmity is "too much" partisanship, a plaintiff's burden is higher still, for "[p]olitics and political considerations are inseparable from districting and apportionment," and it is "idle * * * to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney* v. *Cummings*, 412 U.S. 735, 752-753 (1973).

Appellants failed to make the required showing here. Appellants maintain that they produced suffi-

cient evidence of invidious partisan discrimination because the pattern of population deviations correlated with party affiliation. But the deviations also correlated with the effort to maintain minority ability-to-elect districts, and appellants failed to negate that obvious alternative explanation. Thus, statistics alone did not create the requisite inference that the Commission intentionally discriminated along partisan lines. To the contrary, the district court's factual findings, which appellants have not challenged as clearly erroneous, confirm that the deviations were best explained by the Commission's desire to comply with the VRA—just as the statistics suggested.

Evidence that political considerations motivated some commissioners in some line-drawing decisions also does not suffice to establish a prima facie case of invidious discrimination. This Court's precedents refute the notion that a map with minor deviations must be entirely free of political influence to avoid triggering an intrusive judicial inquiry into the justification for population disparities. And the facts of this case stand in stark contrast to the blatant regional favoritism and selective incumbent protection held to invalidate a reapportionment plan in *Larios* v. *Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam), aff'd, 542 U.S. 947 (2004)—the sole case in which this Court has approved an equal-population challenge to a map with minor deviations. Indeed, Arizona's plan gave Republicans slightly more than their proportionate share of seats in the state legislature. Particularly because a "plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority," *League of United Latin Am.*

Citizens (*LULAC*) v. *Perry*, 548 U.S. 399, 419 (2006) (opinion of Kennedy, J.), appellants' minimal showing regarding the role of political considerations in the design of Arizona's map does not suffice to trigger further inquiry.

B. The minor deviations were in any event fully justified by the Commission's rational and legitimate interest in complying with Section 5 of the VRA.

States undoubtedly have a rational interest in abiding by the VRA's mandates when they redistrict, and that interest, no less than other traditional districting criteria, can justify minor deviations from perfect population equality. If States had to simultaneously comply with the VRA *and* adopt the smallest possible population deviation, they could be forced to abandon other important goals long recognized to warrant minor deviations.

Nor does *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), undermine the legitimacy of the Commission's efforts to comply with Section 5, which applied to Arizona when the challenged map was drawn and implemented. Strong reliance interests counsel against requiring mid-decade redistricting to eliminate the minor population variances in Arizona's plan based on the change in the law brought about by *Shelby County*.

ARGUMENT

THE DISTRICT COURT CORRECTLY REJECTED APPELLANTS' EQUAL PROTECTION CLAIM

The Equal Protection Clause provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. That provision requires "both houses of a bicameral state legislature" to "be apportioned

on a population basis." *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964). This Court has recognized, however, that the Constitution does not demand perfect population equality in state legislative districts; States are afforded a modicum of flexibility "to pursue other legitimate objectives." *Brown* v. *Thomson*, 462 U.S. 835, 842 (1983); see *Gaffney* v. *Cummings*, 412 U.S. 735, 748-749 (1973) ("Fair and effective representation" does not "depend solely on mathematical equality," but may also turn on other "relevant factors" and "important interests" that "States may legitimately be mindful of."). Legislative policies that may justify some population variance include, for example, "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983). As the Court has explained, "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." *Gaffney*, 412 U.S. at 749.

To provide States with leeway to pursue traditional districting goals within the bounds of substantial population equality, this Court has adopted a strong presumption that a state legislative "apportionment plan with a maximum population deviation under 10%" is constitutional. *Brown*, 462 U.S. at 842. Such "minor deviations from mathematical equality," the Court has observed, "are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the

State." *Gaffney*, 412 U.S. at 745, 751 (holding that plaintiffs failed to carry their initial burden when the deviation was approximately 8%); *White* v. *Regester*, 412 U.S. 755, 764 (1973) (declining to find that a disparity of 9.9% "must be justified to the satisfaction of the judiciary to avoid invalidation"); *Fund for Accurate & Informed Representation, Inc. (FAIR)* v. *Weprin*, 796 F. Supp. 662, 668 (N.D.N.Y.) (finding no prima facie case warranting further judicial analysis where deviation was 9.43%), aff'd, 506 U.S. 1017 (1992).[2]

In order to overcome the strong presumption of constitutionality and impose a burden of justification on the State, a plaintiff challenging minor population deviations must come forward with sufficient evidence to infer that a redistricting plan reflects invidious discrimination. *Gaffney*, 412 U.S. at 740-741. If a plaintiff makes that showing, the State must offer a "rational state policy" to justify the disparities. *Brown*, 462 U.S. at 843 (citation omitted). The plaintiff must ultimately prove that invidious discrimination, rather than legitimate districting goals, produced the deviations. See *Larios* v. *Cox*, 300 F. Supp. 2d 1320, 1338 (N.D. Ga.) (per curiam), aff'd, 542 U.S. 947 (2004).

Applying that framework, appellants' equal protection claim fails. Appellants did not make out a prima facie case that the minor population disparities in

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[2] In contrast, plans with deviations exceeding 10% are presumptively unconstitutional and must be justified by the State. See *Brown*, 462 U.S. at 843. In evaluating significant deviations, "[t]he ultimate inquiry" is whether the plan "may reasonably be said to advance [a] rational state policy and, if so, whether the population disparities" nevertheless "exceed constitutional limits." *Ibid.* (citation and internal quotation marks omitted).

Arizona's plan resulted from deliberate partisan discrimination. The inquiry should end there, but if the disparities are further scrutinized, they were justified by the rational and legitimate policy of VRA compliance. The district court therefore properly rejected appellants' claim.

A. Appellants Failed To Establish A Prima Facie Case That The Minor Population Deviations In Arizona's Plan Resulted From Invidious Partisan Discrimination

Because the overall population deviation in Arizona's redistricting plan is only 8.8%, appellants bore the initial burden of producing evidence sufficient to infer that the disparities resulted from invidious discrimination. J.S. App. 9a-10a, 12a.[3] Appellants failed to carry that burden.

1. To guard against unwarranted federal-court superintendence of state districting decisions, this Court has evaluated whether a plaintiff made out a prima facie case of invidious discrimination even where, as here, the case proceeded to a trial at which the State offered justifications for minor population disparities. See *Gaffney*, 412 U.S. at 738-739, 740-751 (reversing judgment for plaintiffs after trial without considering justifications because "a prima facie case of invidious discrimination * * * was not made out");

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[3] Like other States, Arizona uses total population data to comply with population-equality principles when redistricting. Apportionment plans that equalize total population are constitutional because they ensure equal representation for equal numbers of people, see U.S. Amicus Br. at 11-12 & n.3, *Evenwel* v. *Abbott*, No. 14-940 (Sept. 25, 2015), and appellants have not argued that States must use a different metric.

Regester, 412 U.S. at 759, 763-764 (same).[4] But the Court has not had occasion to articulate the circumstances under which a plaintiff carries that initial burden. In other contexts, the Court has emphasized that "[t]he prima facie case serves an important function" by "eliminat[ing] the most common nondiscriminatory reasons for" the challenged action. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253-254 (1981); see *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977) (plaintiff must "at least" negate the "most common legitimate reasons" that could explain the action). Thus, although "the precise requirements of a prima facie case can vary depending on the context," *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 512 (2002), a "plaintiff carries the initial burden" only when he produces evidence "from which one can infer, if such actions

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[4] In this respect, review of redistricting decisions differs from some other contexts in which discrimination is alleged. In Title VII cases, the Court has held that, after a trial on the merits, it "is no longer relevant" whether the plaintiff made out a prima facie case because the burden-shifting framework is not "rigid" but instead is "merely a sensible, orderly way to evaluate the evidence." *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983) (citation omitted); see *Hernandez* v. *New York*, 500 U.S. 352, 359 (1991) (plurality opinion) (applying same principle to a claim under *Batson* v. *Kentucky*, 476 U.S. 79 (1986)). In contrast, this Court's redistricting precedents correctly impose a rigid initial burden on plaintiffs in recognition that redistricting is a core sovereign function that should not ordinarily trigger intrusive scrutiny of a State's justifications for minor population deviations, even on appeal following a trial. See *Gaffney*, 412 U.S. at 751 ("The point is, that such [judicial] involvements should never begin" if a plaintiff fails to make out a prima facie case.). The prima-facie-case requirement thus plays a substantive role in the adjudication of a population-equality challenge.

remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion." *Furnco Constr. Corp.* v. *Walters*, 438 U.S. 567, 576 (1978) (citation and internal quotation marks omitted).

In the redistricting context, this Court's precedents indicate that adherence to traditional districting criteria is the most common legitimate explanation for minor population deviations. See, *e.g.*, *Brown*, 462 U.S. at 842-843. At a minimum, therefore, a plaintiff who alleges that such disparities instead resulted from invidious discrimination must come forward with evidence that reasonably negates the inference that the deviations were produced by the pursuit of legitimate state districting goals. That is a stringent burden—and appropriately so. Given the "sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995), courts should exercise considerable caution before inferring that a State intentionally departed from equal-population principles for invidious reasons. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *id.* at 915, and States therefore should not have to justify minor disparities "to the satisfaction of the judiciary" absent a strong initial evidentiary showing of invidious discrimination, *Regester*, 412 U.S. at 764. Placing a high initial burden on the plaintiff guards against "repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality" and ensures that federal courts do not "become bogged down in a vast, intractable apportionment slough

* * * when there is little, if anything, to be accomplished by doing so." *Gaffney*, 412 U.S. at 749-750.

These considerations apply with particular force when a plaintiff alleges that minor deviations resulted from "too much" partisanship. As the *Gaffney* Court recognized, "[t]he reality is that districting inevitably has and is intended to have substantial political consequences." 412 U.S. at 753. The Court accordingly has not interpreted constitutional standards to require the "impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Id.* at 754.[5] Recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney* deemed it "idle * * * to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it"—even where the map contains minor population deviations. *Id.* at 752-753.

Indeed, if minor deviations coupled with allegations of partisanship sufficed to make out a prima facie constitutional violation, the risk of federal court overinvolvement would skyrocket. "District lines are rarely [politically] neutral phenomena," *Gaffney*, 412 U.S. at 753, so a challenger may always credibly contend that lines in a map with minor disparities were

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[5] The Arizona Constitution likewise makes no quixotic attempt to strip all political considerations from the redistricting process. Four AIRC commissioners are chosen by partisan actors with attention to the commissioners' personal political affiliations. Ariz. Const. Art. 4, Pt. 2, § 1, ¶¶ 3, 5, 6. In addition, the Commission is directed to create "competitive districts" when possible and may consider party registration and voting history data in specified circumstances. *Id.* ¶¶ 14(F), 15.

motivated in some part by partisanship. If that allegation suffices to require justification by the State, virtually no state legislative map will be immune from challenge. See *Cox* v. *Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (observing that a rule that "politics as usual" is "go[ing] too far" will more likely "encourage politically motivated litigation than * * * vindicate political rights"). States will have no choice but to seek perfect population equality to avoid intrusive judicial inquiries into districting decisions and possible federal-court control of the districting process. That is precisely the result this Court has repeatedly sought to avoid. See, *e.g.*, *Gaffney*, 412 U.S. at 749-751; *Brown*, 462 U.S. at 842.

2. Appellants did not come forward with sufficient evidence to make out a prima facie case that the minor disparities in Arizona's plan were more likely than not caused by impermissible partisan discrimination.[6]

a. Appellants contend (Br. 28 n.20) that "partisanship is statistically explicit" in the plan because most of the underpopulated districts had a plurality of

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[6] Appellants suggest (Br. 56-59) that, because the AIRC is not a state legislature, no "principle of deference" applies to its redistricting plan and "this Court should exercise scrutiny." But States have "primary responsibility for apportionment," whether through their "legislature[s] *or other bod*[*ies*]." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993) (emphasis added); see *Arizona State Legislature* v. *AIRC*, 135 S. Ct. 2652, 2668 (2015) (recognizing that the Commission here was engaged in "a legislative function" that is "performed in accordance with the State's prescriptions for lawmaking"). *Gaffney* itself involved a redistricting plan drawn by a "three-man bipartisan Board" composed of state-court judges, and the Court nonetheless affirmed that "state reapportionment is the task of local legislatures or of those organs of state government selected to perform it." 412 U.S. at 736, 751.

Democratic-registered voters and most of the overpopulated districts had a plurality of Republican-registered voters. But, as the district court recognized, the pattern of population deviations equally corresponded with the most obvious alternative explanation—the Commission's effort to maintain minority ability-to-elect districts under the VRA. J.S. App. 37a; see *id.* at 9a-10a (summarizing statistics showing that most of the underpopulated districts were presented as ability-to-elect districts); *Hunt* v. *Cromartie*, 526 U.S. 541, 552 (1999) (recognizing the difficulty in discerning a State's motivation for drawing district lines when evidence "shows a high correlation between race and party preference"). The statistics alone thus do not make it "more likely than not" that the Commission invidiously discriminated against Republicans, *Furnco Constr.*, 438 U.S. at 576, because "the alleged pattern in the final map easily is explainable on grounds other than partisanship"—namely, VRA compliance, J.S. App. 104a (Silver, J., concurring in relevant part).[7]

This Court's summary affirmance in *Weprin* further supports the conclusion that a correlation between minor population deviations and party affiliation does not suffice to make out a prima facie case of invidious partisan discrimination. *Weprin* involved an equal protection challenge to a state redistricting plan with a total deviation of 9.43%. 796 F. Supp. at 668.

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[7] Notably, neither underpopulation nor overpopulation necessarily reflects invidious intent. It would not be appropriate to infer a motive to discriminate against Republicans simply because they were placed in an overpopulated district, for example, if the overpopulation tipped the district from competitive to a safe Republican seat.

The district court treated the 10% threshold for minor variations as an absolute safe harbor and so did not require the State to justify the deviation. *Ibid.* The plaintiffs appealed to this Court, arguing that they had carried their initial burden by pointing to evidence of invidious partisan discrimination, including statistics demonstrating that "the most over-populated and *under*-represented districts [were] areas favorable to the Assembly Minority while the most under-populated and *over*-represented areas [were] those most favorable to the Assembly Majority." J.S. at 10 n.2, *Weprin*, *supra* (No. 92-586).

This Court summarily affirmed. *FAIR* v. *Weprin*, 506 U.S. 1017 (1992). Although that disposition cannot be read to signal approval of the district court's reasoning, the Court necessarily concluded that the plaintiff's allegations—citing a statistical correlation similar to the one here—did not suffice to require justification by the State. See *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (per curiam) ("Summary affirmances * * * without doubt reject the specific challenges presented in the statement of jurisdiction."). In this case, as in *Weprin*, the Court should conclude that the correlation between population deviations and political affiliation, which is easily explainable on non-invidious grounds, does not create a reasonable inference of intentional partisan discrimination.

The district court's factual findings do not alter that conclusion. Appellants erroneously suggest (Br. 21) that the court found that the Commission "deliberately and systematically underpopulat[ed] Democrat districts" in order "to provide partisan benefit to the Democrat party." What the court actually found was that "the population deviations were primarily a

result of good-faith efforts to comply with the [VRA]"—just as the statistics indicated could be the case. J.S. App. 4a; see *Arizona State Legislature* v. *AIRC*, 135 S. Ct. 2652, 2675 (2015) (understanding the district court in this case to have found that the deviations "in the main[] could *not* be attributed to partisanship") (emphasis added).[8]

b. Focusing on the changes to District 8, the district court did find that some "commissioners were motivated in part in some of the linedrawing decisions by a desire to improve Democratic prospects." J.S. App. 6a. By any measure, that evidence does not suffice to create a prima facie showing of invidious partisan discrimination warranting further review.

This Court has only once affirmed invalidation of a map with minor population deviations, and the facts of that case are a far cry from those present here. See *Larios*, *supra*. In *Larios*, a three-judge district court struck down a state legislative map with a population deviation of 9.98% based on "abundant[]" evidence that the disparities "were not driven by any traditional redistricting criteria" but instead "resulted from the arbitrary and discriminatory objective of increasing the political power of southern Georgia and inner-city Atlanta at the expense of voters living" elsewhere, "and from the systematic favoring of Democratic incumbents and the corresponding attempts to eliminate as many Republican incumbents as possible." 300 F. Supp. 2d at 1341-1342, 1352-1353; see *id.* at 1329-1330

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[8] Appellants do not challenge that factual finding as clearly erroneous. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-288 (1982) (district court determinations regarding intent or motivation are factual findings subject to clear-error review).

(observing that 22 Republican incumbents lost seats due to incumbent pairings in the 2002 election held under the map, while only 3 Democratic incumbents lost seats that way). Because the policies of regional favoritism and selective incumbent protection were "plainly unlawful," the district court did not attempt to resolve whether or when a map with minor disparities is vulnerable to challenge simply because partisanship played some role in its creation. *Id.* at 1352. *Larios* thus does not support the argument that any degree of political influence in a legislative apportionment plan suffices to infer that population deviations resulted from invidious discrimination.

Indeed, *Gaffney* refutes the suggestion that any consideration of political impact in the design of malapportioned districts makes out a prima facie claim of invidious discrimination. The Court in *Gaffney* reversed the judgment of a three-judge district court, which had invalidated a map with a total deviation of about 8% on the ground that "[a] policy of partisan political structuring" could not "be approved as a legitimate reason for violating the requirement of" population equality. 412 U.S. at 740, 751 (internal quotation marks omitted) (quoting *Cummings* v. *Meskill*, 341 F. Supp. 139, 149-150 (D. Conn. 1972)). The plaintiffs argued that the plan was a "gigantic political gerrymander" because virtually every "line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." *Id.* at 752. But this Court nevertheless held that "the allegations and proof of population deviations among the districts fail[ed] in size *and quality*" to make out a prima facie

case of invidious discrimination. *Id.* at 741 (emphasis added).

There is much wisdom in *Gaffney*. As noted, politics is part of redistricting, and an allegation that partisanship caused population inequality is easily made. See pp. 17-18, *supra*. Moreover, minor population deviations abound: Following the 2010 census, almost all States adopted redistricting plans with some minor disparities, and 28 States have maps with deviations exceeding 8%. See Nat'l Conference of State Legislatures, *2010 NCSL Congressional and State Legislative Redistricting Deviation Table*, http://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx (last visited Oct. 30, 2015). If any showing of political influence suffices to trigger a lengthy legal battle culminating in the possible invalidation of those redistricting plans (and consequent federal-court control of the districting process), States will have little choice but to draw perfectly equal districts at the expense of districting goals long recognized to justify minor deviations.

Here, the evidence that political considerations played some role—although not a predominant one—with respect to some district lines should not suffice to establish a prima facie case of invidious discrimination. J.S. App. 4a, 36a, 41a-42a, 78a-79a. That evidence did not rule out legitimate districting goals as the primary explanation for the disparities. In fact, the record was replete with evidence that many of the Commission's districting determinations—including those that resulted in deviations—served legitimate districting aims and drew broad bipartisan support. See, *e.g.*, *id.* at 39a (describing "the bipartisan support for the changes leading to the population deviations in

the draft map"); *ibid.* (noting that all five commissioners supported the final configurations of the ten potential ability-to-elect districts); see also AIRC Br. 15-18.

Nor did appellants come forward with evidence to suggest that the Commission used population deviations to "fence[]" a political group "out of the political process" and "invidiously minimize[]" its "voting strength." *Gaffney*, 412 U.S. at 754. To the contrary, the Republican Party gained slightly more seats in the 2012 elections conducted under the map than its proportionate two-party registration share. J.S. App. 98a (Silver, J., concurring in relevant part) ("[U]nder the map [appellants] believe was created to systematically harm Republican electoral chances, Republicans are *overrepresented* in the legislature."); see *LULAC* v. *Perry*, 548 U.S. 399, 419 (2006) (opinion of Kennedy, J.) (noting that a districting plan that "more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority").

The evidence that "partisanship played some role in" the design of District 8 likewise does not raise an inference of invidious discrimination even with respect to that district. J.S. App. 78a. The evidence showed that the changes to District 8, which had only a slight effect on population deviations, did not gain the support of the majority of the commissioners until they received guidance that the changes could strengthen the map's compliance with the VRA; thus, appellants could not show "that partisanship predominated over legitimate factors." *Id.* at 42a, 79a. Because appellants failed to carry their initial burden of showing that partisanship impermissibly infected the Commis-

sion's work with respect to this one district, let alone the map as a whole, the court correctly rejected their equal protection claim.

B. The Minor Population Deviations In Arizona's Plan Were Justified By The Rational And Legitimate Goal Of Complying With Section 5 Of The VRA

Applying the proper framework, no inference of invidious discrimination arose in this case and Arizona should not have been required to justify the minor deviations in its redistricting plan. If the Court chooses to scrutinize those deviations, however, it should conclude that they were justified by the Commission's interest in avoiding retrogression under Section 5 of the VRA, and that *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), which was decided after the challenged map was drawn and implemented, does not call into question the legitimacy of that interest.

1. Compliance with Section 5 was a rational state policy that justified the population deviations in Arizona's plan

1. As eight Justices of the Court have previously recognized, compliance with Section 5 constitutes not only a rational government policy, but a compelling interest for redistricting plans subject to strict scrutiny. See *LULAC*, 548 U.S. at 518 (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, J.J.); *id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in

part and dissenting in part, joined by Ginsburg, J.).[9] The Arizona Constitution mandates that redistricting plans comply with the VRA, Ariz. Const. Art. 4, Pt. 2, § 1, ¶ 14(A), and there can be no dispute that such compliance qualifies as a legitimate districting criteria. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 284 (2004) (plurality opinion) (listing examples of traditional redistricting criteria, including "compliance with requirements of the [VRA]").

No less than any other legitimate districting goal, compliance with the VRA can justify minor population disparities. This Court has explained that "[a]ny number of consistently applied legislative policies might justify some variance." *Daggett*, 462 U.S. at 740. It would be anomalous to insist on perfect equality in districts that are configured to avoid retrogression, while permitting deviations to, for example, "maintain the integrity of [a State's] political subdivision lines," *Mahan* v. *Howell*, 410 U.S. 315, 326-327 (1973), or "ensur[e] that each county has one representative," *Brown*, 462 U.S. at 843. Compliance with the VRA is surely "as legitimate a reason" for population variances "as [those] other policies." J.S. App. 67a.

Indeed, a policy of zero tolerance for small population deviations in minority ability-to-elect districts

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[9] Compliance with other VRA provisions, such as Section 2, likewise would constitute a rational state policy that may justify minor deviations. Cf. *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997) (assuming, without deciding, that compliance with Section 2 is a compelling state interest). Indeed, the status of Section 5 for redistricting plans based on the 2010 census may not be relevant where the jurisdiction had a strong basis in evidence to believe that Section 2 required the same result as Section 5.

could force States to choose between risking noncompliance with the VRA or sacrificing other traditional districting goals. If a jurisdiction were required to simultaneously avoid retrogression *and* adopt the smallest possible population deviations, it might have no option but to split local political subdivisions, abandon principles of compactness and contiguity, or draw incumbents into the same district. This Court has rightly declined to interpret the Constitution to impede States in their pursuit of other goals within the bounds of substantial population equality, and the rationale animating those decisions applies with full force to districts designed to comply with the VRA.[10]

2. There is no merit to appellants' and the Arizona Secretary of State's arguments that VRA compliance cannot justify small population disparities.

a. Appellants' observation (Br. 44) that "[a] statute cannot command a constitutional violation" is of course true, but is entirely beside the point. The relevant question is whether a constitutional violation occurs when a State's effort to comply with the VRA results in minor population deviations. As demonstrated above, VRA compliance qualifies as a legiti-

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[10] The Department of Justice's guidance supports the view that compliance with Section 5 may justify minor population deviations in a state or local legislative plan. When a covered jurisdiction asserts that it cannot avoid retrogression based on population shifts, the Department considers whether a reasonable alternative plan exists that is less retrogressive. In that context, the guidance states that "a plan that would require *significantly* greater overall population deviations is not considered a reasonable alternative." *2011 Guidance* 7472 (emphasis added). The guidance thus reflects the Department's position that a plan that produces minor, rather than significant, population deviations may be a reasonable alternative. J.S. App. 69a.

mate and rational state policy, pursuant to which "some deviations from the equal-population principle are constitutionally permissible." *Reynolds*, 377 U.S. at 579. Appellants provide no basis to conclude that VRA compliance stands on a different constitutional footing than other traditional districting criteria that may warrant minor disparities.

b. Appellants also suggest (Br. 41-45) that the VRA did not require Arizona to create ten minority ability-to-elect districts, attempting to undermine statutory compliance as a justification for the small deviations in the plan. But the district court recognized that appellants had not "given the court a basis to independently determine" whether the creation of ten ability-to-elect districts was "strictly necessary" to comply with the VRA. J.S. App. 73a-74a. Any such determination would require a functional analysis, see *2011 Guidance* 7471, and is "often complex in practice." *Georgia* v. *Ashcroft*, 539 U.S. 461, 480 (2003); see also *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1273 (2015) ("The standards of § 5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome."). Because appellants did not provide the court with a functional analysis or any evidence establishing the number of ability-to-elect districts in the benchmark plan and the new plan, they did not show that the Commission's determination was incorrect. J.S. App. 74a, 77a-78a (emphasizing that all commissioners agreed the new plan should have ten ability-to-elect districts based on analysis of the benchmark plan).

More fundamentally, the Commission followed the right process, and its good-faith effort to comply with the VRA would justify the minor disparities even if it miscalculated the precise number of ability-to-elect districts necessary to avoid retrogression.[11] If a court instead were to "determine the minimum number of ability-to-elect districts necessary to comply with the [VRA]" and "strike down a plan if minor population deviations resulted from efforts that [the court] concluded were not strictly necessary for compliance," States would have "a very narrow target" as they reconciled constitutional and statutory mandates. J.S. App. 75a-76a. The Constitution does not place States in that bind, with the risk of either a constitutional or statutory violation if they miscalculate *exactly* what Section 5 requires.

Indeed, even when strict scrutiny applies to a redistricting decision, the Court has not required "the States to 'get things just right'" in that manner. *Bush* v. *Vera*, 517 U.S. 952, 978 (1996) (plurality opinion) (citation omitted). Rather, "deference is due to [States'] reasonable fears of, and to their reasonable efforts to avoid," liability under the VRA. *Ibid.* Appellants are wrong to suggest that States are afforded

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[11] This case thus differs from *Alabama Legislative Black Caucus*, in which the State followed the wrong process by incorrectly interpreting Section 5 to require maintenance of the precise percentage of minority voters in ability-to-elect districts as existed in the benchmark plan. 135 S. Ct. at 1272-1274. This Court remanded for application of the correct Section 5 standard, but notably emphasized that "[t]he law cannot insist that a [S]tate * * * determine *precisely* what percent minority population § 5 demands" when it redistricts because that would trap the State between competing constitutional and statutory requirements. *Id.* at 1273-1274.

less latitude to balance constitutional and statutory obligations in the context of a population-equality challenge—where their actions are subject to rational-basis review—than they are afforded under strict scrutiny.

c. The Arizona Secretary of State contends (Br. 27) that the minor population deviations cannot be justified by VRA compliance because, in her view, the Commission did not make "an honest and good faith effort" to construct equal districts. *Reynolds*, 377 U.S. at 577. To be sure, the Commission received advice that the Constitution permits minor deviations that result from legitimate districting policies, and it decided to tolerate small disparities to accommodate the rational goal of complying with the VRA. But it would be a topsy-turvy rule to find that a State's reliance on the leeway afforded under this Court's precedents interpreting the population-equality mandate somehow serves to invalidate the State's plan.

The Secretary's argument hinges on her assertion (Br. 1-2) that the Commission "intentionally underpopulated" ability-to-elect districts between the draft map and the final map based on counsel's advice "that underpopulating minority districts was an acceptable tool for complying with the [VRA]." J.S. App. 30a. But the Commission received that advice when it was exploring options to ensure minority groups had the ability to elect in districts that were almost all *already* underpopulated in the draft map. See Ariz. Sec'y of State Br. 10-11 (summarizing statistics showing that seven of the ten districts in the draft map were underpopulated). The Commission either had to move in population that might enable the minority group to elect its preferred candidates, or move out population

that might preclude the ability to elect—and counsel's advice reflected that the Commission could exercise discretion in choosing between those options as it balanced a variety of districting aims, so long as the resulting disparities remained within permissible bounds. There is no reason to think the Commission would not have made exactly the same population shifts if the ability-to-elect districts in the draft map had been overpopulated rather than underpopulated, which undermines the allegation that the changes reflected an intentional plan to underpopulate.[12]

Nor is there any indication that the Commission adopted population deviations it did not believe were actually needed to comply with the VRA. There was no evidence, for example, that the Commission could have created equally strong ability-to-elect districts that cohered equally well with other districting criteria yet produced fewer population variances.[13] In the

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[12] The Secretary erroneously assumes, moreover, that intentional underpopulation is *per se* impermissible. As noted, pp. 25-26, *supra*, even districting decisions subject to strict scrutiny may be constitutional if they serve the compelling interest of complying with the VRA. It follows that achieving VRA compliance through the intentional creation of districts that are slightly underpopulated, which would be subject to mere rational-basis review, likewise may be permissible.

[13] The Secretary asserts (Br. 14) that an alternative map produced by appellants' expert would have resulted in a smaller deviation while avoiding retrogression. But the district court found that the expert's map was not "a practical alternative." J.S. App. 74a. It contained only eight potential ability-to-elect districts and so conflicted with the Commission's judgment that it was necessary to create ten such districts. *Ibid.* Moreover, the expert admitted "he had not taken other state interests into account" in creating the map, "including interests clearly identified as legitimate." *Ibid.*

absence of that kind of evidence of a discriminatory purpose, the Secretary cannot show that the Commission shifted lines "because of" the (minor) effect on equality, rather than simply "in spite of" that effect. *Miller*, 515 U.S. at 916 (quoting *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979)). There is accordingly no basis to disturb the district court's conclusion that the Commission's effort to comply with the VRA justified the minor deviations in the challenged plan.

2. Shelby County *does not affect the validity of the Commission's effort to comply with Section 5 of the VRA*

This Court's decision in *Shelby County*, which held that the existing coverage formula in Section 4(b) of the VRA could not be used to make Section 5 mandatory for any State, does not undermine the legitimacy of Arizona's districting decisions.[14]

In arguing to the contrary (Br. 46-47), appellants misunderstand the nature of the inquiry into a State's justification for minor deviations. This Court has emphasized that "the proper equal protection test" to adjudicate a population-equality challenge "is not

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[14] Although *Shelby County* removed the legal compulsion to comply with Section 5, it did not suggest that an effort to preserve minority voting power is an illegitimate districting criteria or one that cannot warrant minor population deviations. See 133 S. Ct. at 2631 ("We issue no holding on § 5 itself, only on the coverage formula."); see also *Daggett*, 462 U.S. at 742-743 (assuming without deciding that a State that was not subject to Section 5 could justify population deviations based on the goal of "preserving the voting strength" of minority groups if the State offered evidence that disparities were caused by that goal). Appellants are therefore wrong to suggest (Br. 46-47) that the district court's decision gives "continuing force to Section 5" in an impermissible manner, akin to permitting racial segregation of schools.

framed in terms of 'governmental necessity,' but instead in terms of a claim that a State may 'rationally consider.'" *Mahan*, 410 U.S. at 326 (citation omitted). And it was eminently rational for the Commission to attempt to comply with Section 5 when it adopted the challenged map, notwithstanding the later decision in *Shelby County*. At the time, Section 4—which made compliance with Section 5 mandatory for Arizona—was "presumed constitutional" as an Act of Congress. *Vera*, 517 U.S. at 992 (O'Connor, J., concurring). Further, both Sections 4 and 5 had been repeatedly upheld by this Court. See, *e.g.*, *Lopez* v. *Monterey County*, 525 U.S. 266, 282-285 (1999); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328-333 (1966). After the VRA was reauthorized in 2006, every court to address the issue again upheld the relevant provisions until this Court decided *Shelby County*. See *Shelby County* v. *Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), aff'd, 679 F.3d 848 (D.C. Cir. 2012), rev'd, 133 S. Ct. 2612 (2013); *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (three-judge court), rev'd on other grounds, 557 U.S. 193 (2009). The presumption of constitutionality of federal statutes, and the long history of decisions upholding the relevant portions of the VRA, readily provided Arizona with a rational basis to conclude that it must comply with Section 5.

Because that compliance was rational, the minor population deviations were justified when the map was adopted and remain so today. Appellants' argument would place States in an impossible position by requiring them to "attempt to predict future legal developments and selectively comply with voting rights law in accordance with their predictions," or else risk invali-

dation of their redistricting plans years later. J.S. App. 72a. That result—which contravenes this Court's "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan," *Vera*, 517 U.S. at 978 (plurality opinion)—cannot be the law.

In addition, strong reliance interests are at stake. This Court has recognized that the interests protected by the Equal Protection Clause must be balanced against citizens' interests in political stability in determining when redistricting is required. For example, States are not required to redistrict more than once per census period because of the "need for stability and continuity in the organization of the legislative system." *Reynolds*, 377 U.S. at 583; see *LULAC*, 548 U.S. at 421 (opinion of Kennedy, J.) (describing legal fiction that plans are constitutionally apportioned through the decade as "a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability").

That same balancing counsels against requiring mid-decade redistricting to eliminate minor population variances, which were justified when adopted, based on the change in the law brought about by *Shelby County*. Any equal protection injury in this context is minimal because "relatively minor population deviations among state legislative districts" cannot be said to "deprive individuals * * * of fair and effective representation." *Regester*, 412 U.S. at 764 (rejecting an equal protection challenge to a deviation of 9.9%). On the other side of the balance, a requirement to redistrict now would undercut the stability and continuity of state governance in the 16 States that adopted plans in compliance with Section 5 following the

2010 census, see U.S. Dep't of Justice, *Status of Statewide Redistricting Plans* (Aug. 6, 2015), http://www.justice.gov/crt/status-statewide-redistricting-plans, in addition to the thousands of formerly-covered local jurisdictions. Under these circumstances, the Constitution does not "require[] repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature." *Gaffney*, 412 U.S. at 749.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. XIV, § 1 provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Ariz. Const. Art. 4, Pt. 2, § 1 provides in pertinent part:

Section 1. (1) The senate shall be composed of one member elected from each of the thirty legislative districts established pursuant to this section. The house of representatives shall be composed of two members elected from each of the thirty legislative districts established pursuant to this section.

* * * * *

(3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same

political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

(4) The commission on appellate court appointments shall nominate candidates for appointment to the independent redistricting commission, except that, if a politically balanced commission exists whose members are nominated by the commission on appellate court appointments and whose regular duties relate to the elective process, the commission on appellate court appointments may delegate to such existing commission (hereinafter called the commission on appellate court appointments' designee) the duty of nominating members for the independent redistricting commis-

sion, and all other duties assigned to the commission on appellate court appointments in this section.

(5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with ten nominees from each of the two largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties in Arizona.

(6) Appointments to the independent redistricting commission shall be made in the order set forth below. No later than January 31 of years ending in one, the highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate. Each such official shall have a seven-day period in which to make an appointment. Any official who fails to make an appointment within the specified time period will forfeit the appointment privilege. In the event that there are two or more minority parties within the house or the senate, the leader of the larg-

est minority party by statewide party registration shall make the appointment.

(7) Any vacancy in the above four independent redistricting commission positions remaining as of March 1 of a year ending in one shall be filled from the pool of nominees by the commission on appellate court appointments or its designee. The appointing body shall strive for political balance and fairness.

(8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be registered with any party already represented on the independent redistricting commission and who shall serve as chair. If the four commissioners fail to appoint a fifth member within fifteen days, the commission on appellate court appointments or its designee, striving for political balance and fairness, shall appoint a fifth member from the nomination pool, who shall serve as chair.

* * * * *

(14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below:

A. Districts shall comply with the United States constitution and the united states voting rights act;

B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;

C. Districts shall be geographically compact and contiguous to the extent practicable;

D. District boundaries shall respect communities of interest to the extent practicable;

E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;

F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

(15) Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.

* * * * *

3. 52 U.S.C. 10304 provides:

Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Co-

lumbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes

to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

No. 14-232

IN THE
Supreme Court of the United States

WESLEY W. HARRIS, ET AL.,
Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.
Appellees.

On Appeal from the United States District Court for the District of Arizona

BRIEF OF FORMER OFFICIALS OF THE U.S. DEPARTMENT OF JUSTICE WHO ENFORCED THE VOTING RIGHTS ACT AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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November 2, 2015

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are former officials of the United States Department of Justice who had responsibility for enforcing the Voting Rights Act. 52 U.S.C. § 10301 *et seq.* [formerly 42 U.S.C. § 1973 *et seq.*]. Collectively, they served in both Democratic and Republican administrations, and oversaw the preclearance of redistricting plans following the last five Censuses.

Amici have a unique and valuable perspective on the breadth of preclearance requests made prior to this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) and the practical effects should this Court decide that the goal of achieving preclearance prior to *Shelby County* was not a "legitimate" or "rational" interest. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). Each *amici* also has intimate knowledge of the preclearance procedures and protocols for submissions under Section 5 of the Voting Rights Act prior to this Court's decision in *Shelby County*.

Amicus curiae Gilda R. Daniels served in the Civil Rights Division of the Department of Justice from 1995 to 1998 and from 2000 to 2006, including as Deputy Chief of the Voting Section.

Amicus curiae Julie A. Fernandes served in the Department of Justice from 1996 to 2002. There, she litigated cases under section 2 and section 5 of the

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

Voting Rights Act as a trial attorney in the Voting Section of the Civil Rights Division, was Counsel to the Assistant Attorney General for Civil Rights with responsibility for supervision of the work of the Voting Section, and served as an Attorney Advisor at the Office of Legal Counsel. From 2009 to 2011, Ms. Fernandes served as Deputy Assistant Attorney General in the Civil Rights Division, where her responsibilities included direct supervision and oversight of all litigation, legal and policy work of the Voting Section.

Amicus curiae J. Gerald Hebert served in the Department of Justice from 1973 to 1994 and held numerous supervisory positions in the Voting Section of the Civil Rights Division, including Acting Chief, Deputy Chief, and Special Litigation Counsel. Currently, Hebert serves as the Executive Director and Director of Litigation at the Campaign Legal Center, in addition to his private practice specializing in election law and redistricting. He is also an Adjunct Professor of Law at Georgetown University Law Center and at New York Law School, where he teaches courses on voting rights and election law. Hebert has represented numerous jurisdictions in seeking preclearance from the Department of Justice for voting changes.

Amicus curiae Steven J. Mulroy served in the Civil Rights Division of the Department of Justice from 1991 to 2000, and within the Voting Section of the Civil Rights Division from 1991 to 1996. In that time, he worked on numerous Section 5 preclearance submissions and on Section 5 preclearance litigation.

He is currently a Professor of Law and Associate Dean for the Cecil C. Humphreys School of Law at the University of Memphis, where he teaches Voting Rights and Election Law, Federal Discrimination, Constitutional Law, and other courses. He has published scholarly articles on voting rights issues.

Amicus curiae Mark A. Posner served in the Civil Rights Division of the Department of Justice for 23 years, including 15 years in the Division's Voting Section. In the Voting Section, he helped manage the Department's reviews of voting changes submitted for preclearance under Section 5, and served as the Department's Special Section 5 Counsel from 1992 to 1995. He worked on voting rights enforcement for the Lawyers' Committee for Civil Rights Under Law from 2009 to 2015 as a Senior Counsel, and also has published several articles regarding Section 5 enforcement.

Amicus curiae James P. Turner served in the Civil Rights Division of the Department of Justice from 1965 to 1994, working for seven consecutive national administrations of both political parties in enforcing Section 5 of the Voting Rights Act of 1965. As Deputy Assistant Attorney General, he supervised the Division's voting rights enforcement program from 1969 to 1994. He also periodically served as Acting Assistant Attorney General for Civil Rights when that position was vacant, the longest such service was 14 months during 1993 and 1994.

Amicus curiae William R. Yeomans served in the Civil Rights Division of the Department of Justice from 1981 to 2005. From 1996 to 2002, he supervised the work of the Voting Section as Acting Assistant

Attorney General, Chief of Staff and Counselor to the Assistant Attorney General, and Acting Deputy Assistant Attorney General. Prior to that, he litigated appeals involving sections 2 and 5 of the Voting Rights Act as a trial attorney in the Appellate Section. From 2006 to 2009, he served as Chief Counsel for Senator Edward M. Kennedy on the Senate Judiciary Committee where he worked on the 2006 reauthorization of the special provisions of the Voting Rights Act. He currently serves as a Fellow in Law and Government at American University Washington College of Law, where he teaches in the areas of civil rights and legislation.

SUMMARY OF ARGUMENT

Appellants brought this challenge to the 2012 Arizona redistricting plan alleging that the minor population deviations in the plan were motivated by pro-Democratic partisanship. The district court found that they were not. Instead, the district court held that the minor population deviations were motivated by the Commission's goal of achieving Section 5 preclearance on the first attempt. Now, Appellants urge this Court to hold that achieving Section 5 preclearance approval was not a legitimate or rational justification for the minor population deviations. Appellants' arguments are misguided and the repercussions of the holding they request would be significant.

The Commission's goal of complying with Section 5 of the Voting Rights Act's non-retrogression standard and achieving preclearance on the first attempt was a reasonable policy goal with the practical benefits of conserving resources and protecting its sovereign control over the vital function of redistricting. It was both "legitimate" and "rational" and easily justified the minor population deviations in the redistricting plan. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). Indeed, avoiding retrogression, quite apart from preclearance, is a reasonable and legitimate goal.

Nothing in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), a case concerning state sovereignty decided almost a year and a half after the Arizona plan was adopted, suggests otherwise. The relevant inquiry here is whether the Commission acted based on legitimate and rational goals. In the districting context, the Court routinely judges redistricting maps based on the facts

at the time of redistricting. Hindsight logic serves no purpose here. Moreover, *Shelby County* invalidated the Section 4 coverage formula but never suggested that compliance with the Section 5 non-retrogression standard is an unconstitutional goal. And *Shelby County* itself only holds that Section 4 "*can no longer be used* as a basis for subjecting jurisdictions to preclearance." *Id.* at 2631 (emphasis added).

The holding Appellants urge the Court to adopt is incorrect, unnecessary, and would disrupt political stability across the country. At the time of the 2010 redistricting cycle, Section 5 preclearance was mandatory for all or parts of sixteen States (covered States or covered political subdivisions). Preclearance law as it existed at the time of the post-2010 redistricting cycle required covered jurisdictions to take Section 5 compliance and the racial effects of their actions into consideration when designing redistricting maps. The preclearance submission letters of covered jurisdictions demonstrate that States and localities routinely did design their maps in order to comply with Section 5. The preclearance requirements of Section 5 applied to every level of political subunit in those covered jurisdictions. As a result, the number of redistricting plans potentially affected is significant. Between 2010 and 2013, 1,160 redistricting plans were submitted to the Department of Justice for Section 5 preclearance.

Therefore, if this Court were to hold that compliance with Section 5 was not a rational or legitimate consideration, over a thousand redistricting plans would be open to legal challenges, creating

massive instability in the political process in States throughout the nation. Put differently, if *Shelby County* is given the effect that Appellants seek, over a thousand redistricting plans potentially would be open to constitutional equal apportionment challenges (notwithstanding the inclusion of only minor population deviations in the plans). The potential impact of Appellants' suggested rule cannot be understated.

Perhaps acknowledging that their *Shelby County* argument does not hold water, Appellants argue that the Commission's reliance on Section 5 cannot justify the population deviations because the Commission "overshot the mark" by enacting more ability-to-elect districts under the new plan than under the pre-2010 map (a factual proposition unsupported by the decision below) and because Section 5 did not *require* unequal population deviations. Br. of Appellants at 42. These arguments (even if based on a factual predicate, which they are not) misunderstand the Section 5 preclearance procedures and requirements.

First, as the Commission went about its task of drawing a non-retrogressive plan, it did not have before it a simple, clear answer to the critical question of what the precise number of ability-to-elect districts was in the post-2000 plan, as it existed in 2011 (i.e., the non-retrogression benchmark). Accordingly, the Commission had to factor the absence of certainty in this regard into its decision-making. As construed by both the Department of Justice and the District Court for the District of Columbia, the non-retrogression standard did not offer up a simplistic, formulaic answer to the benchmark question. Instead, both the

Department and the District Court laid out a series of analytic factors that each covered jurisdiction should consider (in the first instance), and which the Justice Department and/or the District Court thereafter should consider when preclearance is requested, to identify the number of ability-to-elect districts in the relevant pre-existing plan. Thus, the Commission reasonably relied on the advice of experts and counsel in determining how many ability-to-elect districts existed in the benchmark plan and how many ability-to-elect districts should be drawn in the new plan to obtain preclearance.

Second, Section 5 did not require jurisdictions to violate the one-person, one-vote standard to obtain preclearance. The Section 5 redistricting guidance issued by the Justice Department in 2011 (before the post-2010 redistricting cycle was underway) expressly stated that "[p]reventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7472 (Feb. 9, 2011). Historically, state and local governments have drawn redistricting plans in order to meet the requirements of Section 5 that contained minor population deviations. Plans that include minor population deviations motivated by legitimate goals such as Section 5 compliance are not constitutionally suspect.

The Commission therefore acted reasonably by selecting a map that both satisfied Section 5 and the one-person, one-vote principle under this Court's precedent. The Court should affirm the district court's sound decision.

ARGUMENT

I. If the Court Holds that Achieving Preclearance Under Section 5 of the Voting Rights Act Was Not A Legitimate Or Rational State Interest, It Will Have The Unnecessary and Destabilizing Effect of Subjecting Over a Thousand State and Local Redistricting Plans to *Post-Hoc* Constitutional Challenges.

A. Achieving Preclearance Was a Legitimate and Rational Interest of States Previously Covered by Section 4 of The Voting Rights Act and Nothing in *Shelby County* Counsels a Different Result.

One of the central questions before this Court is whether, assuming any justification of minor population deviations is constitutionally necessary, the Commission's goal of Section 5 preclearance was a "legitimate consideration[] incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579. At the time of the redistricting, Arizona was required to submit any voting change to the Department of Justice or the District Court for the District of Columbia for preclearance and its redistricting plan was not effective as law unless and until it was precleared. 52 U.S.C. §

10304 [formerly 42 U.S.C. § 1973c]; 28 C.F.R. § 51.10. This legal requirement was well-established and upheld by this Court on four occasions. *See Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). The Commission had a compelling reason to comply with a law that had been upheld on four prior occasions. *See League of United Latin American Citizens ("LULAC") v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.); *id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.) (agreeing in separate opinions that Section 5 compliance may serve as a compelling state interest).

Further, the Commission's stated goal was not only a policy goal to comply with applicable federal law, but also a practical goal of obtaining preclearance *on the first try*, J.S. App. at 6a, 23a, 39a, designed to save resources,[2] ensure that the Commission (and not the

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[2] Numerous courts have acknowledged the resource-intensive nature of redistricting. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 750 (1973) (counseling against courts' involvement in the "vast, intractable apportionment slough"); *Bonneville County v. Ysursa*, 129 P.3d 1213, 1221 (Idaho 2005) ("We simply cannot micromanage all the difficult steps the Commission must take in performing the high-wire act that is legislative district drawing."); *Legislature v. Reinecke*, 492 P.2d 385, 389 (Cal. 1972) ("Reapportionment, however, is an extremely complex matter.").

courts) retained control over the redistricting plan,[3] and avoid making Arizona ineligible for bail out for another ten years. J.S. App. at 24a ("The Commission was aware that, among other consequences, failure to preclear would make Arizona ineligible to bail out as a Section 5 jurisdiction for another ten years."); 52 U.S.C. § 10303(a)(1)[formerly 42 U.S.C. § 1973b(a)(1)]. These practical considerations are certainly at least as legitimate and rational as the accepted policies of protecting incumbents or drawing districts based upon political affiliation. *Alabama Legislative Black Caucus v. Alabama ("ALBC")*, 135 S.Ct. 1257, 1270 (2015).[4]

One need only review the district court's opinion in this case to understand the lengthy, complex, and resource-intensive process of redistricting. J.S. App. at 13a-35a (describing the Commission's redistricting process). Failure to achieve preclearance by the Department of Justice would have required the Commission to return to the drawing board, time permitting, and engage in that process all over again, or forfeit the right to draw the State's legislative plan to the courts.

[3] *See, e.g., Navajo Nation v. Ariz. Ind. Redistricting Comm'n*, 230 F. Supp. 2d 998 (D. Ariz. 2002) (court-imposed plan for the Arizona legislature after preclearance was denied).

[4] Appellants' brief suggests that States can never rely on compliance with the Voting Rights Act in order to justify even minor population deviations under 10%, *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (noting that "maximum population deviation[s] [under 10%] fall[] within this category of minor deviations"), because the Voting Rights Act does not *require* districts of unequal population. Br. of Appellants at 41. However, the Court does not demand that States prove that any single factor, such as compactness or incumbency protection, *required* the population deviations in the plan that the State drew. Instead, the Court has

Nothing in *Shelby County* compels, or even counsels, a different result. *Shelby County* did not affect the realities that faced Arizona at the time it drew its plan and submitted its redistricting plan to the Department of Justice. The Commission's decisions must be judged based on the legal and factual landscape facing the Commission at that time. This is especially true here, where the standard only requires that Arizona designed its plan based on a "legitimate consideration," *Reynolds*, 377 U.S. at 579, and the contrary result would undermine both political stability and state sovereignty, *see LULAC*, 548 U.S. at 421 (opinion of Kennedy, J.) (noting that "States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant

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properly allowed States the flexibility to pursue legitimate redistricting objectives so long as they do not lead to significant population deviations, and even then the deviations potentially may be justified. *See Mahan v. Howell*, 410 U.S. 315, 328 (1973) (upholding a plan with a 16% deviation because "the legislature's plan for apportionment . . . *may be reasonably said* to advance the rational state policy of respecting the boundaries of political subdivisions") (emphasis added).

Appellants' argument logically extends to Section 2 of the Voting Rights Act, 52 U.S.C § 10301, as well, suggesting that Section 2 compliance could never be relied upon to justify a population deviation, no matter how small. Such a holding would also wreak havoc on the state redistricting cycle and open the floodgates to litigation wherever the slightest population deviation exists. It would place States in an impossible bind, requiring them to "get things just right," *Bush v. Vera*, 517 U.S. 952, 978 (1996) (plurality opinion), which the Court has declined to do even when applying strict scrutiny analysis.

redistricting, with accompanying costs and instability") and *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.").

To hold otherwise would yield the bizarre result that, in order to comply with the Constitution, Arizona was required to flout then-current U.S. Supreme Court precedent, ignore federal law (Section 5), incur likely significant legal costs for violating federal law, and risk court-imposition of a redistricting plan—all based on a prescient vision of this Court's decision in *Shelby County* over a year later. This hindsight logic cannot prevail. Indeed, this Court has held that States should be given far more leeway even when the standard is not rationality but strict scrutiny. *See Bush v. Vera*, 517 U.S. 952, 978 (1996) (adopting the "strong basis in evidence" standard in order to avoid a "stalemate by requiring the States to get things just right" in recognition of "the importance in our federal system of each State's sovereign interest in implementing its redistricting plan") (internal quotation marks omitted).

Shelby County itself suggests that Arizona's prior reliance on Section 4 coverage is constitutionally acceptable. 133 S.Ct. at 2631 ("[Congress's] failure to act leaves us *today* with no choice but to declare §4(b) unconstitutional. The formula in that section *can no longer be used* as a basis for subjecting jurisdictions to preclearance.") (emphases added). In the post-*Shelby* era, when Arizona decides to redistrict, it may do so without obtaining preclearance approval.

B. Avoiding Retrogression, Apart From Preclearance, Is a Legitimate and Rational Interest Adopted by the Arizona Constitution.

Moreover, while *Shelby County* held that the coverage formula under Section 4 was no longer constitutional, this Court did not address the constitutionality of Section 5 or suggest that the goal of satisfying Section 5 and avoiding retrogression was itself unconstitutional or irrational. 133 S.Ct. at 2631 ("We issue no holding on § 5."). A State has a legitimate concern, even after *Shelby County*, that its voting procedures (including the way it's map is drawn) not have the effect of decreasing the opportunity of minority voters to elect representatives of their choice, especially where the *State* reasonably determines that there has been racially polarized voting and that this pattern of voting has had a racially exclusionary effect. After *Shelby County*, neither the Attorney General nor the D.C. Court may enforce the retrogression standard through the coverage formula of Section 4, but that does not preclude a formerly covered jurisdiction from adopting a plan designed to avoid retrogression, even if such a plan departs from strict population equality. In other words, a State can reasonably prioritize, even after *Shelby County*, ensuring that its redistricting plan does not have the effect of decreasing the opportunity of minority voters to elect representatives of their choice.

Arizona adopted this policy and incorporated it into its own Constitution; certainly that choice is not unconstitutional. Ariz. Const. art. IV, pt. 2, § (14) (A) (designating compliance with the Voting Rights Act as an affirmative goal of the redistricting commission). The Commission merely carried out the goals adopted by the Arizona Constitution. The decision in *Shelby County* cannot alone bear the weight of Appellants' *post-hoc* attempt to invalidate Arizona's considered policy to avoid retrogression during its last redistricting cycle.

C. States and Localities Invariably Did Consider the Goal of Achieving Preclearance in Formulating Their Redistricting Plans and Selecting Other Voting Changes.

Prior to *Shelby County*, every covered jurisdiction was required to seek preclearance, either from the Attorney General or the U.S. District Court for the District of Columbia, of any redistricting plan before the plan could go into effect. 52 U.S.C. § 10304. Under either method, the jurisdiction bore the burden of proof. *Georgia v. Ashcroft*, 539 U.S. 461, 471 (2003) (judicial preclearance); 28 C.F.R. § 51.52(a) (administrative preclearance). Therefore, any covered jurisdiction was required to affirmatively prove, to the Attorney General or the D.C. District Court, that the change had neither the purpose nor effect of "denying or abridging the right to vote on account of race or color [or membership in a language minority group]." 52 U.S.C. § 10304. This meant that the covered jurisdiction was required to prove that its redistricting

plan had neither a discriminatory purpose nor a retrogressive effect. *Beer v. United States*, 425 U.S. 130, 141 (1976).

The preclearance regulations themselves required every preclearance submission by covered jurisdictions to include a statement on the effect of the change on minorities. 28 C.F.R. § 51.27. The regulations also requested the submission of race-based data, such as demographics by race of voters and candidates. 28 C.F.R. § 51.28. Thus, Section 5 required jurisdictions to identify the racial consequences of their redistricting plans and to consider compliance with Section 5 in drawing them. To ignore Section 5 requirements would have invited a Section 5 objection by the Attorney General (or rejection of the plan by the D.C. Court) rendering the plan legally unenforceable. Ultimately, it would have risked the loss of control over the redistricting process. *Connor v. Finch*, 431 U.S. 407, 412 (1977) ("In compliance with [Section] 5 of the Voting Rights Act, Mississippi then submitted the [plan] to the Attorney General of the United States. When he objected to the legislation, the District Court proceeded [to impose another plan].").

Therefore, it is no surprise that States and localities did, in fact, take Section 5 compliance and preclearance into account in its most recent redistricting processes. A few examples, of many, illustrate the point.

In California, which has incorporated compliance with the federal Voting Rights Act into its own Constitution, Cal. Const. art. XXI, § 2(d)(2), the State's independent redistricting commission made it abundantly clear that compliance with Section 5, and

the goal of preclearance, significantly influenced its 2011 redistricting plan:

> In light of Section 5, and plausible interpretations of the 2006 Amendments on the retrogression standard, the Commission drew districts that maintained minority voting strength to the extent possible and did not diminish the ability of any minority group to elect their preferred candidates . . . . The Commission paid close attention to racial and ethnic minority demographics within districts containing all or part of the Covered Counties.[5]

In its preclearance submission to the Department of Justice, California frankly explained: "The [Commission] drew each one of these districts to comply with Section 5 of the Voting Rights Act."[6] Indeed, the Commission specifically identified numerous lines it drew *because of* Section 5:

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[5] California Citizens Redistricting Commission, Final Report on 2011 Redistricting (Aug. 15, 2011), http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf.

[6] Office of Attorney General, California Department of Justice & California Citizens Redistricting Commission, Preclearance Submission of the 2011 Redistricting Plan for the Counties of Kings, Merced, Monterey and Yuba by the State of California Under 42 U.S.C. § 1973c (Nov. 15, 2011), http://wedrawthelines.ca.gov/downloads/meeting_handouts_112011/20111116_crc_gdc_finalpreclearancesubmission.pdf.

- "AD 21 includes . . . part of Modesto to meet the requirements for Merced County under Section 5."[7]
- "The boundaries of AD 21 were drawn partly to avoid retrogression in comparison to the benchmark district containing Merced County."[8]
- "The city of Bakersfield was split to comply with Section 5."[9]
- "Because of the need to comply with the requirements of Section 5 . . . the district was not able to be fully nested."[10]
- "The city of Fresno was split . . . in consideration of Section 5."[11]
- "A small portion of the city of Gilroy was also included to . . . fulfill the requirements of Section 5."[12]

Alaska's 2011 preclearance submission similarly established that the goal of achieving preclearance affected the Alaska Redistricting Board's choices in drawing districts. The primacy of preclearance is evident: "The Board was encouraged to think 'outside-

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[7] California Citizens Redistricting Commission, *supra* note 5, at 31.

[8] *Id.* at 31, note 6.

[9] *Id.* at 33.

[10] *Id.* at 45.

[11] Office of Attorney General, California Department of Justice & California Citizens Redistricting Commission, *supra* note 6, at 19.

[12] *Id.* at 20.

the-box' to ensure it avoided retrogression. . . . As a result, the Board felt compelled to reconfigure the traditional boundaries of Alaska Native rural districts."[13] The Board hired a Voting Rights Act consultant to conduct a racial bloc voting analysis and to assist the Board in its Section 5 retrogression analysis.[14] The submission letter explained at length how the benchmark plan and current plan corresponded with respect to Alaska Natives' ability to elect candidates of their choice and the racial bloc voting analysis the Board undertook to ensure non-retrogression.[15] Ultimately, the Board chose a plan that was approved by its expert consultant.[16]

The Alaska Board noted that it "worked extraordinarily hard to come up with a plan that would meet the federal VRA requirements."[17] In fact, it appears that Alaska did precisely what Arizona did

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[13] Taylor Bickford, Alaska Redistricting Board, & Michael D. White, Patton Boggs LLP, Preclearance Submission of the 2011 Alaska State House and Senate Redistricting Plan by the Alaska Redistricting Board Under Section 5 of the Voting Rights Act at 10 (Aug. 9, 2011), http://www.floridasupremecourt.org/pub_info/redistricting2012/03-02-2012/Filed_03-02-2012_Notice_Supplemental_Authority_Appendix.pdf.

[14] *Id.* at 4.

[15] *Id.* at 7-13.

[16] *Id.* at 11.

[17] *Id.* at 10.

here: drew minority ability-to-elect districts that were slightly under-populated to avoid retrogression.[18]

Louisiana's 2011 preclearance submission also showed that Section 5 compliance motivated its statewide redistricting plans. While the State's preclearance submission is replete with evidence of Louisiana legislators debating what was necessary to achieve preclearance, there was unanimous agreement regarding the importance of preclearance and Section 5 compliance in drawing the plan:

- "Chairman Gallot expressed his opinion that failure to include this additional district would be an impediment to preclearance."[19]
- "It is . . . clear from the testimony in Committee and debate on the floor of the House that Speaker Tucker and Chairman Gallot worked to carefully craft a plan that will have the effect of

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[18] *See* Dr. Lisa Handley, A Voting Rights Analysis of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts at 30-31 (2011), http://www.floridasupremecourt.org/pub_info/redistricting2012/03-02-2012/Filed_03-022012_Notice_Supplemental_ Authority_Appendix.pdf (showing that each ability-to-elect district is slightly under-populated).

[19] Statement of Anticipated Minority Impact at 12, Attachment 6 to Louisiana House of Representatives, Submission Under § 5 of the Voting Rights Act: Act 1 of the First Extraordinary Session, 2011 Redistricting the Louisiana House of Representatives (April 21, 2011), ftp://legisftp.legis.state.la.us/06%20Statement%20of%20Minority%20Impact/Minority%20Impact.pdf.

increasing the number of districts across the state that demonstrate an ability to elect a minority candidate of choice."[20]

- "With respect to the remainder of the demographic changes, Speaker Tucker and Chairman Gallot both indicated that where an effective majority minority district could reasonably b[e] drawn it was included in the plan."[21]

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[20] *Id.* at 20.

[21] *Id.* at 25; *see also* Glenn F. McConnell, President *Pro Tempore* of the South Carolina Senate, Submission Under Section 5 of the Voting Rights Act: Request for Preclearance, South Carolina Senate Districts, S. 815, Act 71 of 2011 (July 27, 2011), http://redistricting.scsenate.gov/Cover%20Letter/SC%20Senate%20-%20Preclearance%20Cover%20 Letter.pdf ("Dr. Richard Engstrom conducted a thorough analysis of the changes embodied in Act 71 and concluded that *'the state did an impressive job of avoiding retrogressive results.'*") (emphasis added); Florida Legislature, Submission Under Section 5 of the Voting Rights Act: Request for Preclearance of Florida House Districts in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties (Mar. 12, 2012), http://www.flsenate.gov/UserContent/Session/Redistricting/20120312Preclearance/Request%20for%20Preclearance/Submission%20Memorandum%20-%20House.pdf (noting the preservation of all minority ability-to-elect districts in the redistricting plan); Florida Legislature, Submission Under Section 5 of the Voting Rights Act: Request for Preclearance of Florida Congressional Districts in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties (Mar. 12, 2012), http://www.flsenate.gov/UserContent/Session/Redistricting/20120312Preclearance/Request%20for%20Preclearance/Submission%20Memorandum%20-%20Congress.pdf (same); *id.* at 11 (noting the Florida

Local governments also focused on preclearance and Section 5 compliance when designing local redistricting plans. In Dallas County, the Commissioners Court's 2011 preclearance submission demonstrates close attention to the Section 5 retrogression standard. The Dallas County Commissioner Precinct Redistricting Criteria specifically requires that redistricting plans "meet all requirements of Section 5 of the Voting Rights Act prohibiting retrogression of racial and language minorities."[22] In its submission letter and accompanying statement of change, Dallas County carefully analyzed the racial composition of its newly-drawn districts and discussed how its plan considered and impacted the County's minority population.[23]

Similarly, the New York City Districting Commission's 2013 preclearance submission outlined the Commission's close adherence to Section 5's preclearance requirements in drawing the plan. The Commission was clear that its plan "retain[ed] nineteen

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Constitution's incorporation of the Section 5 standard, "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice," Fla. Const. art. III, § 20(a)).

[22] Dallas County Commissioner Precinct Redistricting Criteria, *in* Dallas County Clerk, April 26, 2011 Court Orders at 137, https://www.dallascounty.org/department/countyclerk/courtorders/2011Apr26c.pdf.

[23] Statement of Change, Ex. C to J. Gerald Hebert (on behalf of Dallas County Commissioners Court), Submission Under Section 5 of the Voting Rights Act Decennial Redistricting Measures that Change District Boundaries (July 15, 2011) (included in Appendix).

'ability-to-elect' districts as required by Section 5 of the Voting Rights Act."[24] The Commission's submission carefully illustrated the redistricting plan's maintenance of benchmark districts as well as its creation of an "additional 'opportunity-to-elect' district."[25] The Commission retained a voting rights expert to assist it in drawing a plan that met the requirements of Section 5.[26] It further explained that it made changes to one district in particular, District 8, to ensure that the district was maintained as an "ability-to-elect" district in compliance with Section 5: "[T]his change also addressed a challenge the Commission confronted with respect to District 8's status as an 'ability to elect' district by increasing the share of the Hispanic population within the district's boundaries."[27] Therefore, New York City is yet another example of a covered jurisdiction that carefully calibrated its plan to comply with Section 5's preclearance requirements.[28]

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[24] City of New York 2012-2013 Districting Commission, Submission for Preclearance of the Final Districting Plan for the Council of the City of New York (Mar. 22, 2013), http://www.nyc.gov/html/dc/html/ submission.html; *see also* N.Y.C. Charter § 52 (2009) ("Such districting plan shall be established in a manner that ensures the fair and effective representation of the racial and language minority groups in New York city which are protected by the United States voting rights act.").

[25] City of New York 2012-2013 Districting Commission, *supra* note 24, at 17-36.

[26] *Id.* at 20.

[27] *Id.* at 16.

[28] Legislators, unsurprisingly, focused on achieving preclearance when crafting other voting changes as well. For example, the

D. Invalidating Achieving Preclearance As a Legitimate Goal Would Threaten the Validity of Over a Thousand State and Local Redistricting Plans.

If this Court reverses the district court and holds that Section 5 was not a legitimate redistricting objective prior to *Shelby County*, the foregoing jurisdictions' redistricting plans will all be thrown into question and subject to equal apportionment challenges (even if their total population deviation is below 10%). However, these exemplary jurisdictions are only the tip of the iceberg.

At the time of the most recent redistricting cycle, following the 2010 Census, nine States were covered entirely by Section 5: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. 28 C.F.R. Pt. 51, App. Another seven States were partially covered: California (4 counties), Florida (5 counties), Michigan (2 townships), New Hampshire (10 towns and townships), New York (3 counties), North Carolina (40 counties), and South

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district court trial regarding the South Carolina voter identification bill is replete with evidence that the bill was crafted with section 5 preclearance in mind. *South Carolina v. United States*, 898 F. Supp. 2d. 30, 54 (D.D.C. 2012) (Bates, J. concurring) (quoting Senator Glenn F. McConnell explaining his efforts to pass a bill that "had a better chance of getting preclearance" and noting that "[t]here was a discussion about" how "to craft a bill that would comply with the voting rights amendment"); *see also id.* (noting that the Speaker of the House Robert Harrell "ask[ed] the staff who drafted the bill for me to please make sure that we are passing a bill that will withstand constitutional muster and get through DOJ or through [the district] court").

Dakota (2 counties). *Id.* For each of the partially-covered States, statewide redistricting plans that affected the covered jurisdictions had to be precleared. *Monterey Cnty.*, 525 U.S. at 278. During the 2010 Census redistricting cycle, the Department of Justice alone made a preclearance determination of 37 statewide redistricting plans in 11 States.[29] This does not include the statewide redistricting plans of those jurisdictions that chose to seek preclearance in the U.S. District Court for the District of Columbia, but nonetheless developed their plans to comply with Section 5.

The preclearance requirement's reach was both broad and deep. In addition to state legislative and congressional plans, it required preclearance of redistricting plans (and other voting changes) in every political subunit within a covered jurisdiction, including school districts, cities and towns, and counties. 28 C.F.R. § 51.6. It covered "any change" in redistricting even if the change "appear[ed] to be minor or indirect, return[ed] to a prior practice or procedure, seemingly expand[ed] voting rights, or [was] designed to remove the elements that caused the Attorney General to object to a prior submitted change." 28 C.F.R. § 51.12. The result is a far larger number of affected local redistricting plans. From 2010 to 2013, 1,160 redistricting plans were submitted to the Department

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[29] United States Department of Justice, Civil Rights Division, Status of Statewide Redistricting Plans, http://www.justice.gov/crt/status-statewide-redistricting-plans (last visited Oct. 29, 2015).

of Justice for Section 5 preclearance.[30] Therefore, statewide redistricting plans are only a fraction of the plans at risk if this Court holds that achieving preclearance under Section 5 was not a valid state interest for purposes of achieving equal apportionment in plans enacted after the 2010 Census and before *Shelby County* was decided.[31]

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[30] United States Department of Justice, Civil Rights Division, Section 5 Changes By Type And Year, http://www.justice.gov/crt/section-5-changes-type-and-year-2 (last visited on Oct. 29, 2015).

[31] In addition, such a holding, which is inconsistent with the Court's prior conclusion that Section 5 compliance is a compelling state interest, *see supra* at 8, could lead to a raft of new claims that redistricting plans (and other voting changes) that were designed to achieve Section 5 compliance were unconstitutional racial gerrymanders (or other unconstitutional legislation). *See Shaw v. Reno*, 509 U.S. 630, 649 (1993) (recognizing racially gerrymandering as a cognizable claim under the Fourteenth Amendment); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (In order to trigger strict scrutiny in a case alleging a racial gerrymander, "[t]he plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's [redistricting] decision . . . ."). Indeed, these redistricting plans and voting changes might be particularly susceptible to attack because the evidence of racial consideration is clearly laid out in the jurisdictions' preclearance submissions. *See supra* Section I.c.; *see also* 28 C.F.R. § 51.27 (requiring a statement of the effect on racial minority groups); 28 C.F.R. § 51.28 (requested detailed racial demographics with submissions). This would create further political instability not only involving the post-2010 redistricting plans now being enforced, but possibly opening the door to challenges to other voting changes covered by the preclearance requirement that remain in force today. *See, e.g.*, 28 C.F.R. § 51.13 (listing covered voting changes included polling places, voter

The dissenting judge below suggested that post-2010 redistricting maps will not be invalidated because "[h]opefully few or no other jurisdictions conscripted Section 5 preclearance to work statewide partisan malapportionment." J.S. App. at 128a. However, that argument is circular and fails to recognize the sweeping implications of a holding that rejects achieving preclearance as a legitimate policy goal. First, the argument is circular because it concludes that the Commission's plan improperly furthered partisan goals by dismissing the Commission's Section 5 preclearance goals as invalid after *Shelby County*. Therefore, the conclusion that Section 5 preclearance was "conscripted" to hide partisan motives is logically unsound. Moreover, while Appellants in this case assert partisan motives, the holding Appellants seek would affect the validity of any plan with any population variance that was drawn to comply with Section 5, regardless of any secret partisan motives.[22]

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qualifications, methods of election, forms of government, candidate qualifications, etc.).

[22] Some of these jurisdictions may be able to rely on compliance with Section 2 as an additional factor motivating their decisions. *Bush v. Vera*, 517 U.S. 952, 978 (1996). However, the Section 2 and Section 5 tests are distinct. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 486-87 (1997). This Court has made clear that, in order to achieve preclearance, a covered jurisdiction need not prove that it complied with Section 2. *Id.*; *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 341 (2000).

Anyone skeptical of the likely litigious fallout resulting from such a holding need look no further than this case, where the Appellants are challenging a redistricting plan with minor population deviations below 10% that actually performs better for Republicans, the party allegedly harmed by this plan according to Appellants, than their proportional share of the State's voter registration numbers. J.S. App. at 98a. The rule that Appellants advocate would twist *Shelby County* to invalidate over a thousand state and local legislative plans across the country. Such a result is neither necessary under this Court's precedent nor desirable.

II. Appellants' Arguments Fundamentally Misunderstand the Preclearance Procedures Under Section 5 of the Voting Rights Act.

The district court found that the "primary factor driving the population deviation was the Commission's good-faith effort to comply with the Voting Rights Act and, in particular, to obtain preclearance from the Department of Justice on the first try." J.S. App. at 6a. For the foregoing reasons and the reasons stated in the district court's opinion, this goal was reasonable, legitimate, and rational and therefore uncontroversial under this Court's precedent. *See supra* Sections I.a and I.b.

Nonetheless, Appellants argue that the minor population deviations cannot be justified by this goal because the Commission "overshot the mark" in attempting to comply with Section 5 and the Voting Rights Act does not "require or authorize population inequality." Br. of Appellants at 42-43; *see also* Br. of

Appellee Secretary of State at 39-43. These arguments not only distort the appropriate standard, *see supra* note 4, but also misunderstand the Department of Justice preclearance procedures and guidelines.

First, the district court specifically declined to determine the precise number of ability-to-elect districts that were required to satisfy Section 5 and held that Appellants failed to meet their burden to prove their allegation that only eight ability-to-elect districts were required. J.S. App. at 74a. Therefore, Appellants argument is unsupported by the record below. The district court properly focused on whether the Commission's acted legitimately in furtherance of its goal of Section 5 preclearance. *Id.* An understanding of the preclearance procedure demonstrates that it did.

As the Commission went about its task of drawing a non-retrogressive plan, it did not have before it a simple, clear answer to the critical question of what the precise number of ability-to-elect districts was in the post-2000 plan, as it existed in 2011 (i.e., the non-retrogression benchmark). In other words, there was no clear "mark" to over- or undershoot.[33] While the

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[33] Appellants' argument that the Commission "overshot the mark" slyly suggests improper race-conscious redistricting. However, this issue is not presented because Appellants chose not to challenge the plan as a racial gerrymander and acknowledge that this is not a racial gerrymandering case. J.S. App. 64a ("[T]his is not a racial gerrymandering case."). Appellants are attempting to smuggle race-conscious districting concerns into their equal apportionment claim because they cannot meet the appropriate standard for racial gerrymanders. The Court should not accept the Appellants' invitation to address this false and unsubstantiated

covered jurisdiction knew that the standard was retrogression, *see Beer*, 425 U.S. at 141, and that the proposed plan would be compared to the benchmark plan, 28 C.F.R. § 51.54 (c), the Attorney General never instructed the covered jurisdiction precisely how many ability-to-elect districts existed in the benchmark plan or that needed to be preserved in a proposed plan. J.S. App. at 23a. Accordingly, the Commission had to factor into its decision-making the absence of certainty in this regard.

As construed by both the Department of Justice and the District Court for the District of Columbia, the non-retrogression standard did not offer up a simplistic, formulaic answer to the benchmark question, and instead both the Department and the District Court laid out a series of analytic factors that each covered jurisdiction should consider (in the first instance) and then the Justice Department and/or the District Court thereafter should consider in identifying the number of existing ability-to-elect districts in each submitting jurisdiction. *See, e.g.*, *Texas v. Holder*, 831 F.Supp.2d 244, 260, 262-265 (2011) (noting that "assessing retrogression is a multifaceted, fact-specific inquiry" and "determining where and how the ability to elect is present is a careful inquiry" and listing various factors to consider). The Commission properly engaged in precisely the type of functional analysis the non-retrogression standard demanded.

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concern as to the manner in which the Commission designed the 2012 plan.

The Department of Justice issued detailed guidance in 2011 to assist covered jurisdictions in complying with the Section 5 non-retrogression standard. Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470 (Feb. 9, 2011). That guidance observed that "[t]he Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment [of ability-to-elect districts in the benchmark plan]." *Id.* at 7471. The Department acknowledged that "[c]ircumstances, such as differing rates of electoral participation within discrete portions of a population may impact on the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change." *Id.* Therefore, the Section 5 ability-to-elect analysis considered not only census data but also data on election history, voting patterns, voter registration, and voter turnout. *Id.* As this case demonstrates, determining the number of ability-to-elect districts in a benchmark or proposed plan "require[d] a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.*

This functional approach was neither new nor novel. *Texas*, 831 F. Supp. at 265 (noting that the District Court's analysis "share[d] many factors" with the DOJ guidance, which was "consistent with the guidance DOJ ha[d] been issuing to assess retrogressive effect for the past two decades"). It allowed covered jurisdictions ample space to design redistricting plans that applied their own redistricting criteria while also ensuring compliance with Section 5's non-retrogression principle.

In keeping with this approach, the Commission conducted a functional analysis, which showed that it was possible to draw between 7 and 10 ability-to-elect districts. J.S. App. at 27a. Thus, as applied to this redistricting, the multi-factored analysis did not necessarily yield a precise "mark" for the Arizona to meet.

"The preclearance process is by design a stringent one." *McCain v. Lybrand*, 564 U.S. 236, 257 (1984). At trial, Bruce Cain, a Voting Rights Act expert, testified that covered jurisdictions often considered it prudent "to be cautious and to take extra steps" to ensure compliance. J.S. App. at 22a (internal quotation marks omitted). The Commission received advice from both its counsel and its Voting Rights Act expert that, in order to ensure preclearance, the Commission would need to present ten ability-to-elect districts to the Department of Justice. *Id.* at 30a. This advice was based on the type of functional analysis that the Department of Justice Guidelines employed. *Id.* at 27a ("Counsel advised that there were some districts without a majority-minority population that had a history of electing minority candidates" and thus, there were "two to three other districts where minorities did not make up the majority [but] nonetheless might be viewed as having the ability to elect."). Appellants would have had the Commission eschew this advice and embark on a path that might have drawn a Section 5 objection by creating fewer ability-to-elect districts. The Commission can hardly be faulted for seeking to avoid a violation of federal law that was applicable to it at that time.

Further, on advice of counsel, the Commission designed a plan that included ten ability- or opportunity-to-elect districts and a total population deviation under 9%. J.S. App. at 12a, 35a. Given that the Commission valued preclearance on the first attempt for legitimate practical and policy reasons, *supra* at 8-13, the Commission's redistricting plan did not overshoot any mark. Instead, it represented a reasonable, good faith effort to construct a map that would both pass constitutional muster and be effective as law after a seamless preclearance process.

Both the Secretary and Appellants make much ado about nothing by arguing that Section 5 does not *require* unequal populations and cannot constitutionally *require* unequal populations in violation of the one-person, one-vote principle. Br. of Appellants at 43; Br. of Appellee Secretary of State at 39-43. While that is true, it misses the point entirely by ignoring this Court's precedents. The Court has repeatedly said that exact population equality in state legislative redistricting is *not* a constitutional requirement. *See, e.g.*, *Reynolds*, 377 U.S. at 578-80; *Brown*, 462 U.S. at 842-43. Minor population deviations, even above 10%, are constitutionally inoffensive when incident to implementing legitimate and rational state districting policies. *Mahan*, 410 U.S. at 328-330; *see also Brown*, 462 U.S. at 842 (upholding a legislative redistricting plan with an average deviation of 16% and a total deviation of 89%).

Therefore, this case is not one where Section 5 of the Voting Rights Act required the Commission to create a plan with unconstitutional population inequality. If a State attempted to justify extreme deviations by relying on the Voting Rights Act, the Appellants' argument might hold some water. But this is not that case. Therefore, while Appellants' argument that "[a] statute cannot command a constitutional violation," Br. of Appellants at 44, is technically correct, it proves nothing where Appellants have failed, as an initial matter, to establish any constitutional violation.

Meanwhile, Appellants are of course correct that nothing in the Voting Rights Act *requires* under- or over- population of districts. The Attorney General's redistricting guidance makes clear that Section 5 did not require jurisdictions to violate the one-person, one vote standard to obtain preclearance. The DOJ guidance expressly stated that "[p]reventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." 76 Fed. Reg. at 7472. However, even when a redistricting plan is submitted for preclearance and the submitted plan violates the one-person, one-vote requirements, "[t]he Attorney General may not interpose an objection" based on that violation. The reason for this is that the Department of Justice's statutory mandate under Section 5 was to ensure that no voting change had the purpose or the effect of diminishing the ability of minorities to elect their candidates of choice. 52 U.S.C. § 10304. For all the reasons discussed above, compliance with Section 5 was precisely the type of rational policy that would justify

minor population deviations under this Court's precedent.

In its 2011 redistricting guidelines, the Department of Justice explained that when considering the availability of less-retrogressive alternative plans for congressional redistricting, a plan "that would require a greater overall population deviation . . . is not considered a reasonable alternative." 76 Fed. Reg. at 7472 (mirroring the strict equal population standard for Congressional districts, *see, e.g.*, *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) ("[T]he command of Art. I § 2 . . . permits only the limited population variances which are unavoidable.")). But for state legislative and local redistricting, where the constitutional demand for equal population is less stringent, "a plan that would require *significantly greater* overall population deviations is not considered a reasonable alternative." 76 Fed. Reg. at 7472.

Therefore, the Department of Justice would have precleared a plan whether the proposed plan contained a one-person, one-vote violation or, like the plan at issue here, contained only minor population deviations. However, if Arizona's submitted plan was retrogressive, the DOJ may have considered a plan with minor constitutionally-sound population deviations to be a valid alternative plan. Based on the Department of Justice 2011 Guidance and the constitutional principles at play, the Commission properly accepted the advice of counsel that minor population deviations were entirely acceptable in a plan designed to avoid retrogression and ensure Section 5 compliance and preclearance.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court.

November 2, 2015 Respectfully submitted,

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APPENDIX

Appendix

Dallas County, Texas

2011 Decennial Redistricting Preclearance Submission, Exhibit C

STATEMENT OF CHANGE

Dallas County, Texas is divided into four (4) election precincts for the purposes of electing the four members of the Dallas County Commissioners Court. (The County Judge is elected countywide and is the fifth member of the Court.) The 2011 redistricting in Dallas County was driven by the imbalance in population amongst the four precincts. Precinct 1 was under populated by 68,500 persons for a deviation of -11.6% from the ideal. Precinct 4 was overpopulated by 57,880 persons from the ideal for a deviation of +9.8% from the ideal.

Dallas County has had a dramatic demographic shift over the last ten years. Dallas has gained 149,240 persons between 2000 and 2010. However, the Anglo population has decreased by 198,624 persons between 2000 and 2010. The Hispanic population grew by 243,211 persons and the African American population has grown by 73,016 persons. In the approved redistricting criteria, the Commissioners Court decided, "Districts should respect population increases and take into account population decreases in Dallas County." (see **Exhibit D**)

Current or Benchmark Map

Precinct 1 is currently dominated by Anglos and has consistently voted for Republican candidates throughout the last decade. Precinct 2 under the benchmark map was also drawn as an Anglo dominated Precinct configured to elect a Republican candidate. Precinct 2 saw significant demographic change from 2001 to 2010 and is now a majority minority Precinct. Precinct 2 is currently represented by Commissioner Mike Cantrell, an Anglo Republican. Precinct 3 is 45.6% African American and was configured in 2001 to elect the candidate of choice of African American voters (Commissioner John Wiley Price) and has done so throughout the last decade. Precinct 4 was originally configured in 2001 to elect an Anglo Republican. However population growth through the decade has made the Precinct 49.3% Hispanic and 16.9% African American. In 2010, voters in Precinct 4 elected a Hispanic Democrat (Commissioner Dr. Elba Garcia).

Substantial Equality in Population:

As prescribed by law, decennial redistricting must strive to achieve equality of representation as a goal, *i.e.* each electoral district within a county should contain approximately the same number of people to comply with the "one person, one vote" requirement of the Federal Constitution.

The chart entitled "2001 Dallas County Commissioners Precincts – Total Population by Race" **(Exhibit L)** provides population data (based upon 2010 U.S. Census figures) for each of the current four precincts. **Exhibit** L also shows the deviation from the ideal population in

the benchmark (current) plan. After adoption of the redistricting Court Order, the four precincts will have substantial equality in population distribution, and therefore will have "equal representation." Specifically, the deviation for the four election precincts is as follows: Precinct 1 is +1.7%, Precinct 2 is -2.3%, Precinct 3 is -3.2% and Precinct 4 is +3.7% all as shown on a chart entitled "2011 Dallas County Commissioner Precincts – Proposed Map – Deviation" attached hereto as **Exhibit M.**

Consideration of a New Majority Hispanic Precinct:

Given the explosive growth in the Hispanic Population from 2000 to 2010, members of the Commissioners Court considered the creation of a second Hispanic opportunity precinct. In attempting to draw a second Hispanic precinct, it was discovered that too much Hispanic population had to be taken from Precinct 4 (Currently represent by an Hispanic (Dr. Elba Garcia)). Taking Hispanic population out of Precinct 4 would have put Hispanics in Precinct 4 at risk of losing the ability to elect the candidate of their choice and so no such maps were produced by the Commissioners Court.

A New Minority Opportunity Precinct

The Court decided that a new district could be configured that would take account for both the dramatic population growth and population loss that occurred in the last decade. The precinct, new Precinct 1, was drawn with population from three of the four "old" or benchmark precincts. The new precinct is 48.0% Hispanic and 21.2% Black. Minority voters will have the opportunity to elect their candidate of choice in the

Democratic primary and in the general election. While population data by race and ethnicity was considered by the Commissioners Court, racial considerations were never the soul or predomination consideration. Instead, the Commissioners Court drew Precincts to adhere to the traditional redistricting criteria they adopted (which included compliance with federal law, including the **Voting Rights Act**).

Number Change

The Dallas Commissioners Court voted (3 to 1) to switch the numbers on what were Precinct 1 and Precinct 2 in the current map. The old Precinct 2 was renumbered as District 1 and an election will be held in this district in 2012. Precinct 1 in the current map was given the number 2 and its voters will elect a commissioner in the 2014 elections.

During the onset of the redistricting process, the Commissioner who currently represents Precinct 1 (in the old map) announced she would not run for reelection. This arrangement meant that the newly drawn Precinct would be represented by an Anglo Republican living outside the Precinct until an election was held in 2014. Under the new configuration, the new Precinct will have an election in 2012 to elect a new commissioner while the old Precinct 1 (now Precinct 2 in the northern part of Dallas County) will be represented by the non-retiring Anglo Republican who lives in the Precinct until 2014.

No. 14-232

In The
Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT
REDISTRICTING COMMISSION, *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Arizona

BRIEF OF *AMICI CURIAE* THE NAVAJO NATION AND LEONARD GORMAN IN SUPPORT OF APPELLEES [IMPACT ON ARIZONA AMERICAN INDIANS]

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus Navajo Nation is a federally recognized Indian tribe and is the largest Indian nation in the United States, comprising over 300,000 members and occupying approximately 25,000 square miles of trust lands within Arizona, New Mexico, and Utah.[2] The Navajo Nation participated in nearly all of the public meetings surrounding the development of the challenged legislative map and strongly advocated for maintaining a robust Native American majority-minority district. The Navajo Nation has been involved in a number of voting rights lawsuits to ensure that its members can participate in the electoral process.

Amicus Leonard Gorman is an enrolled member of the Navajo Nation, a qualified elector in Arizona and a resident of Window Rock, Arizona, in Apache County. Mr. Gorman is the Executive Director of the

---

[1] Counsel of record for the parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or part, and no persons or entity, other than *Amici Curiae* and their counsel, made a financial contribution for the preparation or submission of this brief.

[2] According to the 2010 Census, approximately 173,000 individuals live on the Navajo Reservation, approximately 97% of whom are American Indian. U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, Table 6 (2012), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

Navajo Nation Human Rights Commission. The Commission is charged with protecting and promoting the human rights of Navajo citizens by advocating human equality at the local, state, national and international levels. As part of this mission, the Commission is focused on ensuring that Navajo citizens are able to vote and to elect candidates of their choice. He has participated most recently in Congressional and legislative redistricting for the states of Arizona, New Mexico and Utah. He provided Navajo-sponsored plans for the American Indian majority-minority legislative district in Arizona and testified concerning redistricting before the Arizona Independent Redistricting Commission. Mr. Gorman was a plaintiff in *Navajo Nation v. Brewer*, CV-06-1575-PHX-ROS (D. Ariz. filed June 20, 2006) challenging Arizona's voter identification law.

The Navajo Nation and Leonard Gorman participated as *Amici Curiae* in the case below. *Amici* file this brief on behalf of Navajo citizens, whose right to vote was only recently realized, to demonstrate that the Native American majority-minority legislative district on the Arizona portion of the Navajo Reservation was not drawn for partisan advantage. Further, *Amici* file this brief in support of the right to vote of American Indians, including elders and others who live traditional lifestyles in rural and remote areas where they continue to speak traditional American Indian languages and face the impacts of past discrimination in the areas of health, education, and voting.

SUMMARY OF THE ARGUMENT

Amici agree with Appellee Independent Redistricting Commission ("Commission") that the population deviations in Arizona's 2012 legislative map ("Legislative Plan") are permissible under this Court's jurisprudence and that *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) is not applicable here. Moreover, *Amici* are concerned that if the Court grants relief that the framework for legislative redistricting will change, negatively impacting many Indian voters who only recently secured the right to vote.

ARGUMENT

Appellants' challenge is precisely the type that Justice Scalia warned against – a challenge to a legislative plan based on allegations that minute population deviations resulted from political motives. In his dissent in *Cox v. Larios*'s summary affirmance, Justice Scalia stated that it is not obvious that minor population deviations – within ten percent – go too far.

> To say that it does is to invite allegations of political motivation whenever there is population disparity, and thus to destroy the 10% safe harbor our cases provide. Ferretting out political motives in minute population deviations seems to me more likely to encourage politically motivated litigation than to vindicate political rights.

Cox v. Larios, 542 U.S. 947, 952 (2004). The challenge to the Legislative Plan ignores the requests by thousands of citizens, including those of the Navajo Nation, to create legislative districts that meet not only the neutral state redistricting criteria, but also the limitations set forth by federal law.

Appellants claim that the Legislative Plan was created solely for partisan purposes. Jt. App. 101a.[3] The lower court found that the record reflects legitimate policy reasons for developing the Legislative Plan. This Court should affirm under its prior precedent that minor population deviations are presumptively valid, and that Appellants failed to meet its burden to prove otherwise. This Court should not be persuaded by the conjecture and conspiracy theories that the Commission's sole purpose was to draw a Legislative plan that favored Democrats. This allegation ignores the wishes of the Arizona citizens who participated in good faith and provided testimony to the Commission based on Arizona's constitutional redistricting provisions.

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[3] "J.S. App." refers to the Appendix to the Jurisdictional Statement; "Supp. App." refers to Supplemental Appendix to Motion to Dismiss; "Jt. App." refers to the Joint Appendix; and "S.J.A." refers to the Supplemental Joint Appendix.

I. Arizona's Legislative Plan Is Constitutional.

A. Arizona's Legislative Plan Is Presumptively Valid.

Redistricting is "primarily the duty and responsibility of the State." *Perry v. Perez*, 132 S. Ct. 934, 940 (2012) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). The Legislative Plan has a maximum deviation from the ideal population of 8.8 percent. S.J.A. at 46 (The Legislative Districts "range between 203,026 (4.7% below the ideal population) to 221,735 (4.1% above the ideal population)"). When, as in the instant matter, the maximum deviation is less than ten percent, the apportionment plan is presumptively valid. *E.g.*, *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993).

> [M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State.

Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (internal quotation marks and citations omitted).

Since the deviation is less than ten percent, the Legislative Plan is presumptively valid.

This Court adopted a ten percent standard for deviations in state legislative redistricting. *Brown*, 462 U.S. at 842 (an apportionment plan with a deviation less than 10% is presumptively constitutional); *Gaffney v. Cummings*, 412 U.S. 735, 751-52 (1973) (maximum deviation of 8% does not establish a prima facie case of discrimination); *White v. Regester*, 412 U.S. 755, 763 (1973) (deviation of 9.9% does not establish a prima facie case of discrimination). In *Gaffney*, the Court stated that "minor deviations from mathematical equality among state legislative districts do not make out a prima facie case of invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment so as to require justification by the State." 412 U.S. at 745. The deviation must be higher than ten percent to create a prima facie case of discrimination. *Brown*, 462 U.S. at 842-43.

The 2001 Arizona Independent Redistricting Commission's proposed legislative redistricting plan ranged from -4.080% to +4.95%, for a total acceptable deviation of 9.03%. *Navajo Nation v. Arizona Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998, 1009 (D. Ariz. 2002); *see Jeffers v. Clinton*, 756 F. Supp. 1195, 1201 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991) (10.9% total deviation, with one district overpopulated by 5.8% and one district underpopulated by 5.1%, was acceptable deviation). Here, the maximum

population deviation is 8.8% and presumptively constitutional.

B. Arizona's Geography and Variations in Population Density Must Guide the Development of Any Legislative Redistricting Plan.

Arizona's geography and demography create certain challenges to redistricting. Of the 72,688,000 acres in Arizona, over 30 million acres are federal land, totaling approximately 42%.[4] Another 9.2 million acres consist of state trust land.[5] As the court observed during the 1990 decennial redistricting efforts:

> Arizona is unique. Approximately 27 percent of Arizona's land is located on Indian reservations, far and away the highest percentage in the United States. Other large portions of the state are devoted to National Parks and Forests. These factors, in part, account for the fact that Arizona is sparsely populated.
>
> Arizona's urban areas [metropolitan Phoenix and Tucson] contain the overwhelming bulk of the state's population. . . . This is the

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[4] ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, Table 1, at 4 (2012), *available at* https://www.fas.org/sgp/crs/misc/R42346.pdf.

[5] Arizona State Land Department, https://land.az.gov/ (last visited Oct. 24, 2015).

> background against which this court must adopt or draw a plan. . . .

Arizonans for Fair Representation v. Symington, 828 F. Supp. 684, 687 (D. Ariz. 1992), *aff'd sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993). Arizona's urban population has only become more pronounced in the past twenty years.[6] The rural areas have remained sparsely populated while the metropolitan areas of Phoenix and Tucson have continued to experience rapid growth, as evidenced by a change from the six Congressional districts after the 1990 census to eight Congressional districts after the 2000 census and to nine Congressional districts after the 2010 census. According to the 2010 census, approximately 5.7 million of Arizona's 6.4 million residents live in urban areas covering only 2,187 square miles. The remainder of the population, roughly ten percent, are spread out across 111,408 square miles.[7] The majority of the population lives in the Phoenix metro area, with nearly 4.2 million residents.[8] Despite increased

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[6] In 1990, Arizona's population was 3.6 million. In 2000, the population increased to 5.1 million. In 2010, Arizona's population increased to 6.4 million. U.S. CENSUS BUREAU, CPH-2-4, ARIZONA: 2010, POPULATION AND HOUSING COUNTS, Table 1 (2012), *available at* https://www.census.gov/prod/cen2010/cph-2-4.pdf.

[7] *Id.* at Table 2.

[8] According to the Census Bureau, the Phoenix metro area includes Maricopa and Pinal Counties. In 2010, the population of the Phoenix metro area was 4,192,887. U.S. CENSUS BUREAU, LARGEST URBANIZED AREAS WITH SELECTED CITIES AND METRO

(Continued on following page)

growth in the metropolitan areas, the number of districts has remained constant at thirty multimember districts electing one senator and two representatives each.

The majority of Arizona's Indian Country lies outside of the urban areas. Five of the ten most populated Indian reservations in the United States are located in Arizona. These include the Navajo Reservation, the largest Indian Reservation in both size and population, the Fort Apache Reservation, the Gila River Indian Reservation, the San Carlos Reservation, and the Tohono O'odham Reservation. Nearly all of the residents of these reservations are Native American.[9]

C. Historically, Arizona Has Failed to Protect Minority Voting Rights when Redistricting.

Since the passage of the Voting Rights Act ("VRA") in 1965 until the *Shelby County v. Holder*, 133 S. Ct. 2612, decision in 2013, Arizona was subject to the preclearance requirement under Section 5.[10]

AREAS (2012), https://www.census.gov/dataviz/visualizations/026/508.php (last visited Oct. 24, 2015).

[9] U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, Table 6 (2012).

[10] Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965).

Every decade prior to 2010, an objection was entered to Arizona's redistricting plan. J.S. App. 24a.

In a 1969 redistricting case, the court noted that Arizona's scheme that based reapportionment on voter registration would result in an underrepresentation of Indians in Apache and Navajo Counties. *Klahr v. Williams*, 303 F. Supp. 224, 227 n.6 (D. Ariz. 1969). Because Indians could not vote in Arizona until the literacy tests were banned by the VRA amendments of 1970, "Arizona [had] a serious problem of deficient voter registration among Indians." *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970).

In the first decennial census following the enactment of the VRA and with the removal of the literacy tests, attempts were made to reduce the ability of Indians to elect candidates of choice by dividing the Navajo Reservation into three separate state legislative districts. *Klahr v. Williams*, 339 F. Supp. 922, 924 (D. Ariz. 1972). The court found that the legislative plan violated the Equal Protection Clause because it was done with the intent of "destroy[ing] the possibility that the Navajos, if kept within a single legislative district, might be successful in electing one or more of their own choices to the Legislature." *Id.* at 926-27.

In 1982, the San Carlos Apache Tribe successfully objected to a proposed redistricting plan that aimed to split and dilute the Apache vote. *Goddard v. Babbitt*, 536 F. Supp. 538, 541 (D. Ariz. 1982). The Department of Justice objected to the plan on the

grounds that the plan had a discriminatory effect. Trial Ex. 527.[11] The court found that the proposed plan had "the effect of diluting the San Carlos Apache Tribal voting strength and dividing the Apache community of interest." *Goddard*, 536 F. Supp. at 541.

After the 1990 decennial census, the Arizona Legislature reached an impasse. A three-judge panel was convened. Indian tribes intervened, and the court adopted the "Indian Compromise Plan" as the State's congressional plan. *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 689 (D. Ariz. 1992), *aff'd sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993). In adopting this plan, the Court noted that:

> Although there has been no proof that the Native Americans are entitled to a reapportionment plan designed to maximize their political advantage, they should not be engulfed in a structure that minimizes their potential for meaningful access to the political process. The Indian Intervenors proved that there have been wide-spread practices of discrimination against Native Americans. The court also took judicial notice of that fact. The results achieved through the court's plan will meet the goals of the Indian Intervenors.

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[11] "Trial Ex." refers to those documents admitted during trial. "Trial Tr." refers to the trial transcript.

Id. at 690. While the court drew the congressional map, the U.S. Department of Justice objected to the State's legislative plan because it minimized Hispanic voting strength. In its explanation, the Department of Justice stated that a "submitted plan may not be precleared if its implementation would result in a clear violation of Section 2 of the Act." Trial Ex. 528.

The redistricting plan submitted in 2002 by the Redistricting Commission similarly failed to be precleared initially.[12]

D. The Department of Justice Precleared the Commission's Submission.

This is the backdrop against which the Commission was required to begin drawing the current legislative map – balancing the requirement of one-person one-vote while establishing districts where minorities are able to elect candidates of their choice. Arizona had never before obtained preclearance of its legislative map on its first attempt. J.S. App. at 24a. A principal goal of the Commission was to obtain preclearance on its first attempt, which it succeeded to do. J.S. App. at 23a-24a. The Department of Justice precleared the Commission's Legislative Plan on April 26, 2012. J.S.App. 35a.

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[12] Letter to Lisa Hauser and Jose de Jesus Rivera from Ralph Boyd (May 20, 2002), http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_020520.pdf (focusing on minority voters in five legislative districts).

II. Underpopulated LD 7 Was Not Drawn to Promote an Unconstitutional or Irrational State Policy

To understand that the Legislative Plan was not drawn for an unconstitutional or irrational purpose, one need only look at the most underpopulated district, Legislative District 7 ("LD 7"). Not only was LD 7 configured to ensure that Native Americans could elect a candidate of their choice, the Commission also considered and granted the requests of non-Indians to be in a different district. Further, although LD 7 is one of only two majority party districts in the state,[13] the Appellants' own expert confirmed that there was no partisan motive in the configuration of LD 7.

A. LD 7, The Native American Majority-Minority District, Is Large and Sparse.

Under the 2004 benchmark plan, there is one Native American majority-minority district, Legislative District 2 ("LD 2"). The Commission's goal was to maintain one Native American majority-minority district in the current legislative plan. Nothing in the

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[13] Appellants argument regarding Arizona's voting demographics are misleading. In Arizona, only two of the thirty house districts include a majority registration of either party; both are Democratic – LD 3 and LD 7. S.J.A. at 62. The majority of Arizona voters are Independents. Mary Jo Pitzl, *Independent Voters Biggest Voting Bloc in Arizona*, The Republic, March 24, 2014, http://www.azcentral.com/story/news/politics/2014/03/17/arizona-voter-registration-independents/6526385/.

record supports a contention that LD 7 was drawn for partisan advantage, and the decision below did not enter any such finding.

LD 7 is the only Native American majority-minority district. LD 7, largest in geographical area, smallest in population and the most sparsely populated, is comprised of 66.9% Native Americans and has a Native American voting age population ("Native American VAP") of 63.7%. S.J.A. at 47-48. It encompasses nine Arizona tribes, including the Arizona portion of the Navajo Reservation, the largest Indian Reservation in the United States in both size and population; the San Juan Southern Paiute Tribe located within the Navajo Reservation; and the Hopi, Havasupai, Hualapai, Kaibab-Paiute, San Carlos Apache, White Mountain Apache and Zuni Reservations. Trial Ex. 530 at 47. This is by far the most rural district in the State, with the lowest population density, totaling fewer than ten people per square mile throughout most of the district.[14]

With a total population of 203,026, LD 7 is the most underpopulated district at 4.7% deviation from the ideal population. S.J.A. at 46, 59. The Commission received testimony from tribal leaders, town and city officials, and citizens requesting the ultimate composition of this district. The Navajo Nation and

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[14] ARIZ. DEP'T OF ECON. SEC., LEGISLATIVE DISTRICT DEMOGRAPHICS AND DES CLIENT/PROVIDER SUMMARY HANDBOOK 16 (2014), https://www.azdes.gov/InternetFiles/Pamphlets/pdf/Arizona_Legislative_District_Demographics_Handbook_2014.pdf.

other tribal leaders requested a robust Native American majority-minority district. LD 7 was drawn in order to meet the VRA requirements and to satisfy to the extent practicable the communities of interest of both Native American and non-Native American voters. Trial Ex. 530 at 47 ("The . . . District was adopted to strengthen the ability of Native Americans to elect their candidates of choice.").

B. Appellants Admit that LD 7 was not Underpopulated for a Partisan Purpose.

Appellants' own expert testified that LD 7 was not drawn for partisan advantage. Appellants relied on Dr. Thomas Hofeller to demonstrate that the underpopulation of legislative districts was done with no lawful state interest. Dr. Hofeller, however, admitted in his testimony that the underpopulation of LD 7 was not for a partisan purpose. Hofeller withdrew his opinion that the only logical explanation for the underpopulation of LD 7 was to increase Democratic voting strength. *See* J.S. App. at 228a, 236a; Supp. App. at 9-10; Trial Tr. at 670:18-23.

> QUESTION: You agree that legislative District 7 is a voting rights district under Section 5?
>
> ANSWER: Yes.
>
> QUESTION: You agree that Legislative District 7 has the largest underpopulation in the final map?

ANSWER: Yes, I do.

QUESTION: It's underpopulated by 4.25 percent. Correct?

ANSWER: I'd have to look at my chart, but I'll take your word for it.

QUESTION: All right. And your opinion is the only logical explanation for the underpopulation of Legislative District 7 is to increase Democratic voting strength?

ANSWER: I don't really think so, no.

QUESTION: All right. So with respect to your opinions in this case, you will withdraw any opinion that Legislative District 7 was drawn for partisan reason?

ANSWER: Yes.

Trial Tr. 670:3-22. Appellants' own expert admitted that the underpopulation was not for partisan purposes and proffered no other unlawful purpose for the underpopulation.

C. Underpopulating a District Is One Means to Address Multimember Districts.

The flexibility of the ten percent deviation accommodates Arizona's multimember legislative districts. Judge Wake highlighted the characteristics of a political system based on one-person, one-vote.

> The scrupulousness with which a political system adheres to the doctrine of one-person, one-vote is related to the importance it assigns to political equality. . . . Since the United States is strongly committed to the norm of individual political equality, it is not surprising that it has developed the strictest population deviation standards of any democracy *using single member constituencies*.

Trial Tr. 1021:9-22 (emphasis added). Congressional districts are single member districts, Arizona legislative districts are multimember districts.

In *Thornburg v. Gingles*, this Court stated that "[b]oth this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." 478 U.S. 30, 69 (1986). Indian voters continue to suffer from some of the highest poverty rates and unemployment rates in the country. Reservation Native Americans, including those in LD 7, are impacted by these effects. LD 7 has the highest unemployment rate in the state and ranks lowest in English proficiency.[15] Poverty rates are above 42%.[16]

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[15] ARIZ. DEP'T OF ECON. SEC., LEGISLATIVE DISTRICT DEMOGRAPHICS AND DES CLIENT/PROVIDER SUMMARY HANDBOOK 17 (2014).

[16] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H.*

(Continued on following page)

Polling locations and voter registration sites on reservations are often located at substantially greater distances from voters, than sites located off reservation, resulting in greater costs to voters.[17] Registering to vote is also an obstacle as a majority of counties bordering reservations limit registration locations to off-reservation towns.[18]

The results of the multimember district and depressed political participation are evident from the past decade of elections. While one of the Native Americans' candidates of choice won one of two State Representative seats in benchmark LD 2 (2004 & 2006 – Albert Tom, 2008 – Christopher Clark Deschene, 2010 – Albert Hale), the second seat was won by a non-Hispanic White (2004 & 2006 – Ann Kirkpatrick, 2008 & 2010 – Tom Chabin). Trial Ex. 434 at 1. Sylvia Laughter, an Independent and the Native American candidate of choice receiving the highest number of votes from reservation voters, was not elected in the 2004 election. In comparison, in the 2012 and 2014 elections with an enhanced Native American VAP, both representatives elected from LD 7 were Native American and the preferred candidates of choice for Native American voters: 2012 – Albert

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Comm. on the Judiciary, 109th Cong. 1380, 1383 (2006) (appendix to the statement of Wade Henderson).

[17] *Id.* at 1411-12.

[18] *Id.*

Hale and Jamescita Peshlakai, 2014 – Albert Hale and Jennifer Benally.[19]

D. Underpopulating a District May Address Issues of Undercounting by the Census.

Census data alone is not sufficient to determine if a redistricting plan satisfies the VRA. U.S. Dep't of Justice, *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011). "Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change." *Id.*; Trial Tr. 931:24-932:3. During the trial below, the Commission's expert testified that within minority communities, you have to look at voter turnout, not just population statistics. Trial Tr. 932:6-15. He further testified that there can be lots of problems with the census data. *Id.* at 937-938. The census data "went through three or four decades of controversy about undercount." *Id.* at 938:1-2.

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[19] *See* Arizona State Legislature House Roster, http://www.azleg.gov/MemberRoster.asp?Body=H (last visited Oct. 25, 2015); Arizona State Legislature Member Page Jamescita Peshlakai, http://www.azleg.gov/MembersPage.asp?Member_ID=78&Legislature=51&Session_ID=112 (last visited Oct. 25, 2015).

Native Americans have historically been undercounted in the United States Census.[20] By its own admission, the 2010 decennial census undercounted Native Americans living on reservations at a rate of 4.9%. This is higher than any other group.[21] The Congressional Research Service has reported that while the 2010 census had a 0.01% overcount of the total population, the count for American Indians on reservations was a 4.9% undercount. The population count on the Navajo Reservation has declined in the 2010 census by 7,000 persons from the previous census.[22]

Because of the general inaccuracies in the total Arizona population count as compared to the inaccuracies in the undercount of reservation residents, the actual population of LD 7 may be much closer to the

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[20] *See* Carol Lujan, As Simple as One, Two, Three: Census Underenumeration among the American Indians and Alaska Natives (1990), *available at* http://www.census.gov/srd/papers/pdf/ev90-19.pdf.

[21] U.S. CENSUS BUREAU, *Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census* (May 22, 2012), http://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html (last visited Oct. 25, 2015).

[22] According to the Census Bureau, the population of the Navajo Reservation decreased from 180,000 in 2000 to 173,000 in 2010. U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, Table 6 (2012); Trib Choudhary, Navajo Nation Data from U.S. Census 2000, Table 1, *available at* http://www.navajobusiness.com/pdf/NNCensus/Census2000.pdf.

ideal population for the district than reported by census numbers.[23]

The failures of the census-taking process can be accommodated through the ten percent flexibility for legislative redistricting. In *White v. Regester*, the Supreme Court noted that "we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger [overpopulated] districts so as to deprive individuals in those districts of fair and effective representation." 412 U.S. 755, 763-64 (1973). If the overpopulated district is slightly overcounted while the population in LD 7 is substantially undercounted, then the actual census in the under and overpopulated districts may be much closer than would otherwise appear.

E. The Commission Supported the Desires of Native Americans to Create an Effective Majority-Minority District.

Benchmark district LD 2 was the sole Native American majority-minority district in the 2004 plan. This Commission received much information regarding the need to maintain and enhance a Native American majority-minority district in the 2012 Legislative Plan.

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[23] *See* JENNIFER D. WILLIAMS, CONG. RESEARCH SERV., R40551, THE 2010 DECENNIAL CENSUS: BACKGROUND AND ISSUES 13 (2011).

The Navajo Nation Council adopted a resolution on August 1, 2011 proposing a legislative district with a Native American population of 66.5%. Trial Ex. 422 at 100-108. The Council's stated objectives were to "resist retrogression" and "ensure that Navajo voting rights are protected and preserved." *Id.* at 103. The Navajo Nation Council designated the Navajo Nation Human Rights Commission to take the lead in the redistricting efforts and Leonard Gorman, Director of the Human Rights Commission, became the primary representative of the Navajo Nation and its members at the Commission meetings. *Id.* at 102. Mr. Gorman participated regularly in Commission hearings to encourage the Commissioners to maintain or enhance the Native American VAP and to encourage the inclusion of other Indian nations into a single Native American majority-minority district. The Human Rights Commission published a flyer explaining (i) the redistricting process to Navajo voters and (ii) that it was recommending to the Commission a district that would "improve the voting power of indigenous people in Arizona." Trial Ex. 428 at 10-12. The efforts of the Human Rights Commission were supported by the Navajo Nation Office of the President and Vice President. *Id.* at 7-9.

Public testimony and the advice of Bruce Adelson, the Commission's legal counsel on preclearance, articulated the need to retain and enhance the Native American VAP for LD 7. Mr. Adelson testified at his deposition that the percentage increase in Native American population enhanced the Native

Americans' ability to elect candidates of their choice. Adelson noted that:

> [h]aving worked on the Navajo reservation when I was with the Department [of Justice], I was aware of several situations that led to disenfranchisement, particularly elder Navajo voters who voted in locations for their own Navajo Nation elections that were different than federal election polling places. I had seen that there were potentially thousands of voters back during my career who were not able to vote on the reservation because of these different locations.
>
> . . .
>
> And I think maybe that also goes to removing the part of the district from – that was in Mohave Country, because that portion of the district was not a community of interest with the Navajo Nation and did not support their candidates of choice.
>
> . . .
>
> As I've explained, given all the factors that are prevalent in Arizona, given population loss on the Navajo reservation, given comments from the Navajo Nation to the Redistricting Commission about their preferences and recommendations for redistricting, taking all those and all the factors we've talked about today into account, I believe that it was prudent to make the decision that was made.

Adelson Dep. 213:14-22, 214:5-9, 221:8-15, March 14, 2013.[24]

Navajo citizens also provided written and oral testimony to the Commission to support an increase in the Native American VAP to better ensure that Native Americans can elect candidates of their choice. Navajo Nation Council Delegates appeared and testified in support of a strong Native American voting rights district. Trial Ex. 357 at 88-90, 110-113. Mr. Kimmeth Yazzie, Navajo Nation Elections Office, explained the unique issues facing Navajo voters including the lack of government issued identification and the difficulties involved in obtaining voter identification, obstacles to voting by mail, the need for language assistance, and the confusing nature of voting locations for tribal and state and federal elections. Trial Ex. 428 at 4-6. Mr. Christopher Clark Deschene, a member of the Navajo Nation and a former legislator from benchmark LD 2, explained why Native American Voting Age Population is not a sufficient measure of the ability to elect candidates of Native Americans' choice. He listed 7 criteria: (i) young Navajo voters, registered to vote at their permanent home on the Reservation, but living and working away from their permanent home, may not be able to return to vote; (ii) the tribal primary voting date occurs a few weeks before the state and federal

[24] The parties stipulated to the use of Bruce Adelson's deposition transcript instead of providing live testimony to the trial court. *See* Trial Tr. at 692:2-5.

primary dates and tribal citizens may not have the transportation to travel twice in one month; (iii) on the general election day when the tribal and state and federal elections all take place, the polling places may be miles apart, making it difficult to vote in both places; (iv) some tribal members don't have the necessary government issued identification; (v) voter information in the Navajo language is limited; (vi) if the weather is bad on election day, voter turnout will be low as many Reservation roads are unimproved and not traversable; and (vii) the high rate of unemployment and poor economic and living conditions result in lower turnout at the polls. *Id.* at 1-2.

The San Carlos and White Mountain Apache Tribes which had not been located in a Native American majority-minority district in the previous decade applauded the Commission for its draft legislative map that placed the Apache members with the Navajos in a Native American majority-minority district. *Id.* at 3, 15-17, 19. San Carlos Apache Tribal Vice Chair John Bush explained that while each tribe is a "separate sovereign," there are common interests which can best be expressed through the power of the vote. He urged the Commission to retain a legislative district that included the Apache with the Navajo Nation. Trial Ex. 376 at 10-11. Tribal members spoke up in support of the draft legislative plan, explaining that there would be a stronger native voice and the power to unite on issues that tribes commonly confront. Trial Ex. 376 at 42:11-43:9. If there were Native American candidates who understood the meaning of

the sacred sites and our culture then the voters would know them and the voters would feel "more a part of the United States." *Id.* at 45-50.

F. The Commission Was Vigilant in its Efforts to Comply with the Voting Rights Act and Obtain Preclearance.

The VRA seeks to ensure that protected minorities, including Native Americans, have an opportunity to elect candidates of their choice. Because of Arizona's long history of discrimination against Native American voters, Arizona was subject to the Section 5 preclearance requirements. 52 U.S.C. § 10304. The Commission's desire to comply fully with the Voting Rights Act is a rational state purpose and initial preclearance is a rational goal. J.S. App. 6a.

Under Section 5, a redistricting plan will be evaluated as to whether it has the purpose or the effect of denying or abridging the right to vote on account of race or color. Retrogression looks at whether a minority group has been made worse off by the proposed change. To determine if retrogression exists, it is necessary to compare the proposed plan against the benchmark. A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" when compared to the benchmark plan. *Beer v. United States*, 425 U.S. 130, 141 (1976). For legislative redistricting purposes, the benchmark is

the 2004 legislative plan using the 2010 census data. Under this benchmark, there is one Native American majority-minority district. Therefore, there would be retrogression if the Commission failed to draw at least one effective Native American majority-minority legislative district.

Although retrogression is evaluated at the pre-clearance stage, the Commission is also required to comply with Section 2 of the VRA. *Thornburg v. Gingles*, 478 U.S. 30 (1986); 52 U.S.C. §§ 10301-10314. Preclearance of a legislative plan does not preclude a subsequent Section 2 challenge. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 485 (1997). A number of precleared plans have been found to violate Section 2. *See, e.g.*, *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983); *Buskey v. Oliver*, 565 F. Supp. 1473 (M.D. Ala. 1983). A state violates Section 2 "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10303.

The Commission's voting rights consultant, Mr. Adelson, regularly advised the Commission. On December 16, 2011 he noted "as we come closer to the finish line, the measurement against the benchmark becomes even more inexorable and mandatory." Trial Ex. 404 at 68:8-10. He reminded the Commission that

"[t]he final word is with the Department of Justice." *Id.* at 70:12.

G. Each Commissioner Had the Right to Find a Balance between the Neutral Redistricting Goals Set Forth in the Arizona Constitution.

While compliance with the United States Constitution and the VRA were factors considered by the Commission, they were not the only factors. The Commission considered four other criteria, known as the neutral redistricting criteria as set forth in the Arizona Constitution.

Redistricting is, by its nature, a political process, even when the redistricting is done by a court or by an independent commission, because the resultant maps may determine whether districts will be represented by a Democrat, Republican, or a third party. "In reaching their decisions, the commissioners perform legislative tasks of the sort we make every effort not to pre-empt." *Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm'n*, 208 P.3d 676, 685 (Ariz. 2009); *see also Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). The Arizona Supreme Court recognizes that the Commission has discretion to determine how it will accommodate the state constitutional goals.

> [T]he constitutional requirement that the Commission accommodate specified goals "to the extent practicable" recognizes that

> accommodating the various goals requires the Commission to balance competing concerns. . . . The Commission's need to balance competing interests typifies the political process, in which each commissioner may well define differently the "best" balance of these goals. Deciding the extent to which various accommodations are "practicable" also requires the commissioners to make judgments that the voters have assigned to the Commission, not to the courts.

Id. at 686. None of the goals are primary or subordinate, but all must be considered and weighed by the Commissioners. *Id.* at 687 n.10.

Consideration of the four neutral criteria require "four potentially conflicting goals be balanced against each other 'to the extent practicable.'" *Id.* at 689 (Hurwitz, A., concurring). In transferring responsibility from the Legislature to an independent commission, the Arizona voters left those value judgment decisions to the Commission. *Id.* at 690.

The Commission has flexibility in applying the neutral redistricting criteria. *Id.* at 689. The question for a court reviewing a final adopted plan is whether the Commission considered these neutral criteria and applied it to the extent practicable. The court will uphold the decision of the Commission in applying the neutral redistricting criteria so long as the Commission has a reasonable, although debatable basis. *See id.* (citing *State v. Murphy*, 570 P.2d 1070, 1074 (Ariz. 1977)).

H. Indian Tribes Comprise a Community of Interest.

The Commission received substantial information throughout the public meetings regarding the desire for Native Americans to be part of the Native American majority-minority district. Steve Titla, an attorney for the San Carlos Apache Tribe, advised that the Navajo Nation and the Apaches shared a community of interest because of their common interest in terms of religion, geography, tradition and history. Trial Ex. 338 at 114-15. Leonard Gorman, on behalf of the Navajo Nation, presented its legislative proposal that included a portion of Flagstaff as well as Hopi leased lands. Trial Ex. 422 at 100-08. Hopi Chairman Leroy Shingitewa stated that he wanted to join the Navajo Nation and the Apaches in a district that would also include the sacred San Francisco Peaks. Trial Ex. 349 at 69-71. Hualapai Chairperson Louise Benson supported the Navajo Nation's proposal. *Id.* at 80. Jonathan Nez, Navajo Nation Council Delegate, articulated several of the factors that connect tribes into a community of interest including water rights and issues related to drug trafficking. Trial Ex. 357 at 88-90. Bruce Adelson impressed on the Commissioners the importance that the tribes within LD 7 supported its configuration. Trial Ex. 404 at 69.

Although the Apaches share a community of interest with the Navajo including language, cultural and religious beliefs, there was opposition to placing the Apaches in a Native American district from some

of their non-Indian neighbors. Commissioner Freeman testified that there were non-Indians in the White Mountain area who "did not want to be in the Native American voting rights district." Trial Tr. 901:14-23.

I. Commissioners Accommodated Requests by non-Indians to Be Removed from LD 7, Resulting in Increased Underpopulation.

The changes in LD 7 from the draft map to the final map were not for partisan advantage. LD 7 lost population to other districts in response to requests from non-Indian communities of interest to be removed from the district.

The urban City of Flagstaff was excluded in the draft plan from LD 7 but certain areas north of Flagstaff were included in draft LD 7. The City of Flagstaff submitted a "Value Statement" to the Commission that articulated reasons (i) for being in a competitive district, (ii) for including both the City of Flagstaff and the unincorporated environs in a single district, and (iii) to be in a district different than the Navajo Nation, one in which Flagstaff shares a community of interest that has the same values as Flagstaff. In summary, it requested that the Commission not locate Flagstaff in the Native American majority-minority district. Trial Ex. 422 at 65.

In addition, members of the Flagstaff community urged the Commission to remove the Timberline and Fernwood portions of the Schultz Flood Area from LD

7 and include the Timberline and Fernwood communities with Doney Park in LD 6. Trial Ex. 366 at 23-24 (comments in support of this change by Coconino County); *Id.* at 27-30 (comments in support of this change by Flagstaff City Council); Trial Ex. 422 at 65 (respects the VRA and does not want retrogression of the native populations of northern Arizona but desires to be in a competitive district). This included requests from local governments, professors, and also residents of the Schultz Flood area. *Id.* at 71-72. Commissioner Freeman acknowledged that there were people from the Flagstaff area who did not want to be in the same district with "the Navajo district." Trial Tr. 896:12-20. During trial, Commissioner Stertz also confirmed that the reason for moving population out of LD 7 *was not for partisan reasons*.

> Q. Do you recall what the Schultz Flood Area was?
>
> A. I do.
>
> Q. What was the Schultz Flood Area?
>
> A. There was a flood in 2008 that had affected land. There was a desire by representatives from the Flagstaff 40 as well as the city representatives of Flagstaff to try to keep the Schultz Flood Area within the city of Flagstaff in that district.
>
> Q. And Judge Clifton can't see this, but the other judges will know that Flagstaff is up here in District 6, correct, near the Schultz Flood Area?

A. That's correct.

Q. And the community in the Schultz Flood Area didn't want to be in District 7, correct?

A. There was the desire to not be in District 7.

Q. District 7 was the Native American district, correct?

A. Correct.

Q. And they wanted – they thought their interests were more in line in Flagstaff and wanted to be put in Legislative District 6. True?

A. That's the testimony that they gave, yes.

Q. And the Commission accommodated that. True?

A. True.

Q. And the result of that, though, is it was moving population from Legislative District 7 into Legislative District 6, right?

A. True.

Trial Tr. 248:20-249:20; Supp. App. at 4-5. These individuals preferred to be in LD 6 with the City of Flagstaff. That change alone moved 2,500 people out of LD 7 into LD 6. Trial Tr. 249:21-25.

Draft Map LD 7 extended from the eastern boundary of the State to the western boundary of the

state. On December 8, 2011, Stertz supported the Commission's removal of Mohave County from LD 7 in order to keep the non-reservation portions of Mohave County whole, a reduction of approximately 1500 people from LD 7, increasing the percentage of the Native American population in LD 7. Trial Tr. 252:12-253:13.

On December 12, 2011, changes were made to draft LD 7 to remove Greenlee County. Mr. Desmond explained to Commissioner Stertz that it was "intended to improve its overall voting age Native American percentage" and to "remove non-minority population." Ex. 402 at 147:10-16.

J. Commissioners Had Differing Concepts for LD 7.

Commissioners had to make value judgments, knowing that some people would not be satisfied with the results. These value judgments were reflective of requests made by constituents.

Late in the redistricting process when the Commission was attempting to finalize the legislative plan, Commissioners spoke about their goal for LD 7 Democratic Commissioner Herrera recognized the difficulty for tribes to "get on the same page with other tribes" and explained that he didn't want to make any changes except those necessary as a result of the historic voting analysis. Trial Ex. 404 at 72:22-73. In contrast, Republican Commissioner Freeman asked Mr. Desmond to modify LD 7 to "demonstrate

that a higher Native VAP can be achieved" while keeping much of eastern Arizona whole. Trial Ex. 584 at 1. The plan would have required portions of Flagstaff to be included in LD 7 as well as the communities of Doney Park and Fort Valley. *Id.*

Commissioners from both parties considered options to depopulate LD 7 to enhance the performance of the Native American majority-minority district. Commissioner Freeman proposed a conceptual idea to remove the eastern Arizona portion, non-Hispanic White communities from LD 7 through a narrow corridor from the Apache tribes to the Navajo Nation. The proposal was described as "the Apache cloud." The Native American VAP would have been increased to 65.33% and the population would have been within 5% of the ideal population. Trial Tr. 908:23-912:22. Commissioner Freeman's conceptual proposal addressed the preferences of the non-Reservation portion of eastern Arizona:

> An eastern Arizona district could be constructed to effectively "ring" the Apache Cloud. This district would keep most of the eastern Arizona communities whole, as requested, and could keep the non-reservation portions of Gila, Graham, and all of Greenlee Counties together, again, as requested.

Trial Ex. 584. The proposed concept was neither refined, nor adopted. However, it is clear that these conversations were not partisan driven, but driven by the desire of non-Indians to be excluded from the Native American majority-minority district.

III. This Court's Ruling in *Shelby County v. Holder* Does Not Necessitate a Different Result.

Shelby County v. Holder, 133 S. Ct. 2612 (2013) does not affect the issues presented by the Appellants in this case. Appellants claim that the Legislative Plan violates the one-person one-vote principle set forth in the Fourteenth Amendment. Appellants did not bring a claim under the VRA. They did not bring a declaratory action claiming that either Section 5 or Section 4 is unconstitutional; therefore, *Shelby County* has no impact on this Court's review.

The issue in this case is whether the Legislative Plan is constitutional. *Shelby County* does not impact this Court's analysis in that regard. The IRC was required to comply with the Fifteenth Amendment, which the preclearance mechanism of Section 5 seeks to enforce. The facts demonstrate that the Commission considered numerous factors under state and federal law. Nothing in *Shelby County* bolsters Appellants' claims or impacts this Court's ability to review the federal constitutional question under the Fourteenth Amendment. The Legislative Plan is presumptively valid, and the district court found that neutral reasons existed for the minor population deviations. Because the lower court found that the Legislative Plan was constitutional, this Court should affirm.

A. The Rule of Law Announced in *Shelby County* Is Not at Issue Here.

In *Shelby County*, the Plaintiff filed suit in the District of Columbia seeking declaratory relief that Section 4(b) and Section 5 are unconstitutional and sought to enjoin the enforcement of these sections of the VRA. The Court did not invalidate Section 5. 133 S. Ct. 2612, 2631. In finding the Section 4(b) coverage formula unconstitutional, the Court stated that "[t]he formula in that section *can no longer be used* as a basis for subjecting jurisdictions to preclearance." *Id.* (emphasis added).

The ruling, however does not invoke retroactivity. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97-98 (1993). According to *Shelby County*, jurisdictions listed under the 2006 Section 4(b) coverage formula are no longer subject to Section 5's preclearance obligation.

Here, however, Appellants seek neither a declaration that Section 4(b) is invalid, nor an injunction against application of Section 4(b). Rather, they seek a declaration that the legislative map violates the one-person, one-vote requirement of the Fourteenth Amendment and seek to enjoin use of the map. Jt. App. 116a-177a. *Shelby County* did not hold that preclearance renders the redistricting process *per se* unconstitutional. The mere fact that a map was precleared and that the Commission strived to create districts that comply with the Fifteenth Amendment does not render the map invalid.

B. Preclearance Decisions Cannot Be Challenged.

As this Court noted over fifty years ago, the preclearance process "merely gives the covered State a rapid method of rendering a new state election law enforceable." *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969). Moreover, even in the absence of a coverage formula under Section 4(b), jurisdictions may be ordered to undergo preclearance under Section 3 of the VRA. 52 U.S.C. § 10302; *see Jeffers v. Clinton*, 740 F. Supp. 585, 587 (E.D. Ark. 1990) (as remedy for violations of VRA, jurisdictions may be ordered to undergo preclearance under Section 3). Appellants cannot challenge the Department of Justice's decision to preclear the Legislative Plan. *Morris v. Gressette*, 432 U.S. 491 (1977) (decision not to object to a submitted change cannot be challenged in court). Once a jurisdiction complies with its preclearance obligation, "private parties may enjoin the enforcement of [a] new enactment only in traditional suits attacking its constitutionality." *Allen v. State Bd. of Elections*, 393 U.S. 544, 549-50 (1969).

Shelby County involved a direct attack on the constitutionality of the statute against the Attorney General; the county there sought a declaration that it was not required to undergo preclearance. In pending suits where jurisdictions seek declarations that they are not required to undergo preclearance, *Shelby County* controls. In contrast, here, where the preclearance process has been completed, the holding of *Shelby County* is inapplicable. Appellants would have

needed to challenge the constitutionality of Section 5 for retroactivity to apply, and they failed to do so.

C. Section 5 Is an Enforcement Mechanism of the Fifteenth Amendment.

Section 5 of the VRA seeks to enforce Section 1 of the Fifteenth Amendment which provides that voters shall not be denied the right to vote on the basis of race, color, or previous condition of servitude. U.S. Const., amend. XV, § 1; Voting Rights Act of 1965, 52 U.S.C. §§ 10301-10314. A covered jurisdiction must demonstrate that a proposed voting change does not have the purpose and will not have the effect of discriminating based on race or color. Even if a jurisdiction is not required to comply with Section 5, the jurisdiction must still comply with the Fifteenth Amendment. Thus, the Commission must still ensure that a redistricting plan does not discriminate against minority voters when drawing redistricting plans.

D. Section 5 Was One of Many Factors Considered During the Redistricting Process.

Notwithstanding Section 5, the Commission was still required to comply with Section 2 of the VRA and the state constitutional criteria. *Thornburg v. Gingles*, 478 U.S. 30 (1986); 52 U.S.C. §§ 10301-10314. The VRA seeks to ensure that protected minorities, including Native Americans, have an opportunity to

elect candidates of their choice. Preclearance of a legislative plan does not preclude a subsequent Section 2 challenge. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 485 (1997).

Notwithstanding the decision in *Shelby County*, the Commission must still comply with creating ability-to-elect districts.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,
Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF ARIZONA

BRIEF OF THE SOUTHERN COALITION FOR SOCIAL JUSTICE AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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BRIEF OF THE SOUTHERN COALITION FOR SOCIAL JUSTICE AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

This brief is submitted on behalf of the Southern Coalition for Social Justice ("SCSJ") as *amicus curiae* in support of neither party.[1]

INTEREST OF *AMICUS CURIAE*

Amicus is a 501(c)(3) nonprofit public interest law organization founded in 2007 in Durham, North Carolina. SCSJ partners with communities of color and economically disadvantaged communities in the south to defend and advance their political, social, and economic rights through the combination of legal advocacy, research, organizing and communications. Central to that mission is the guarantee of an equal right to vote for all citizens and the guarantee that each person's vote carries equal weight.

One of *amicus'* primary practice areas is voting rights. *Amicus* frequently represents clients challenging statewide and local redistricting plans that violate the Equal Protection Clause of the Fourteenth Amendment or the Voting Rights Act of

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[1] Appellee Arizona Secretary of State has consented to the filing of *amicus curiae* briefs in support of either party and have so informed the Clerk. Appellee Arizona Independent Redistricting Commission has provided *amicus* with written consent to the filing of this brief. Appellants have provided *amicus* with written consent to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

1965. *Amicus* has represented individual and organizational clients in redistricting cases across the South, including Florida, Georgia, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

Currently, *amicus* is representing clients in three pending lawsuits in North Carolina, in state and federal court, challenging congressional, state, and local redistricting plans enacted by the North Carolina General Assembly following the 2010 Census. In each of these cases, the plaintiffs live in overpopulated districts that they allege were drawn in order to unfairly favor one political party over another. *See Wright v. North Carolina*, 787 F.3d 256 (4th Cir. 2015); *Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections*, No. 5:15-CV-156 (E.D.N.C. June 5, 2015); *City of Greensboro v. Guilford County Bd. of Elections*,[2] No. 1.15-CV-550, 2015 U.S. Dist. LEXIS 95972 (M.D.N.C. July 23, 2015).

Amicus has an interest in ensuring that the central promise of "one person, one vote" as articulated in *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Baker v. Carr*, 369 U.S. 186 (1962), remains a fundamental cornerstone of federal, state, and local governmental structures, and that districting

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[2] The District Court in *City of Greensboro* granted the plaintiffs' motion for preliminary injunction and prevented implementation of a local redistricting plan where the plaintiffs alleged, *inter alia*, that the North Carolina General Assembly arbitrarily and discriminatorily overpopulated certain districts in violation of one person, one vote. *See City of Greensboro v. Guilford County Bd. of Elections*, No. 1:15-CV-550, 2015 U.S. Dist. LEXIS 95972 (M.D.N.C. July 23, 2015).

systems are not established that improperly favor some voters over others.

SUMMARY OF THE ARGUMENT

The one person, one vote rule for legislative redistricting emerged to ensure "the substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state." *Reynolds*, 377 U.S. at 579. An exception to this rule to accommodate partisan gamesmanship is directly counter to its purpose and role in guaranteeing equal protection.

This Court's one person, one vote mandate, derived from the Fourteenth Amendment, is based on the recognition that "[c]itizens, not history or economic interests, cast votes." *Reynolds*, 377 U.S. at 580. Nowhere—whether in *Reynolds*; *Roman v. Sincock*, 377 U.S. 695 (1964); or their progeny—has this Court taken the drastic step of recognizing advancement of political party interests as a legitimate justification for substantial population disparities among districts. While the application of non-arbitrary, traditional redistricting principles may result in deviations from absolute population equality, discrimination based on political party is an inappropriate method of determining the weight of a citizen's vote. *See Abate v. Mundt*, 403 U.S. 182, 185 (1971); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

Holding that a benefit to one political party over another is a legitimate justification for

population deviations, particularly in mid-decade redistricting, would have a far-reaching impact in communities that have traditionally faced significant barriers to equality in voting. *See Rodriguez v. Harris County*, 964 F. Supp. 2d 686, 804 (S.D. Tex. 2013) ("While some . imagine that barriers to voting have been eradicated, the record here is replete with evidence to the contrary.") (internal citations omitted). The last few years have seen a spate of legislative attempts to use an alleged "safe harbor" with respect to population deviations to enact districts that otherwise disadvantage voters who do not support the party in control of the legislature.

One example in North Carolina is the General Assembly's passage of a local redistricting bill that expanded the Wake County Commission from seven to nine members, and changed the seven members elected to staggered terms at-large with residence districts to seven members elected from single-member districts and two members elected from "super districts" with total population deviations of 9.8%.[3] The local bill, which took away the power of the local government body to determine its own boundaries until after the 2020 Census, was passed only after Democrats carried all of the open seats in the 2014 election. The newly adopted redistricting plan is marked by significant population deviations and bizarre-shaped districts that are not geographically compact, and was created to disadvantage voters who have traditionally voted

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[3] *Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections*, No. 5:15-CV-156 (E.D.N.C. June 5, 2015), Doc. 22, para. 1, 3, 32.

Democratic. "The population deviations in the new district system are a deliberate and systematic attempt . . . to unfairly manipulate the political process to give greater weight to the votes of Republican voters and less weight to the votes of Democratic voters."[4] Holding that manipulating population deviations to discriminate against voters of a particular political party is a legitimate governmental interest would strike a fatal blow to fundamental fairness and the opportunity of all voters to participate equally in the political process.

ARGUMENT

THE DESIRE TO GAIN PARTISAN ADVANTAGE DOES NOT JUSTIFY LARGER THAN NECESSARY POPULATION DEVIATIONS AMONG DISTRICTS

A. Fourteenth Amendment Jurisprudence Values the Equal Weight of Each Vote Above All Else

"[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of [representatives]." *Reynolds*, 377 U.S. at 566. In a redistricting plan, deviations from numerical equality violate the Equal Protection Clause unless those deviations result from "legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*,

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[4] *Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections*, No. 5:15-CV-156 (E.D.N.C. June 5, 2015), Amended Complaint, para. 1.

377 U.S. at 579. However, such legitimate considerations must be "free from any taint of arbitrariness or discrimination." *Roman*, 377 U.S. at 710. These protections of one person, one vote also extend to elections for local government offices. *Avery v. Midland County*, 390 U.S. 474, 479 (1968).

Roman further describes the analysis of a one person, one vote claim as follows:

> the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

Roman, 377 U.S. at 710. That is, a legislative body violates the one person, one vote mandate where population deviations are motivated by arbitrary or discriminatory reasons.

In a one person, one vote case, plaintiffs can establish a prima facie Equal Protection violation where the overall population deviation is more than ten percent. *Brown v. Thomson*, 462 U.S. 315, 328 (1973). Where the overall population deviation is less than ten percent, the presumption of constitutionality is overcome by the plaintiff's showing that the redistricting process had a "taint of

arbitrariness or discrimination." *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (*quoting Roman*, 377 U.S. at 710).

"[C]ourts should keep in mind that absolute population equality is the paramount objective. Slight deviations are allowed under certain circumstances...any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features." *Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (internal citations omitted). Significant state policies recognized by this Court are compactness, respecting city or county boundaries, preserving prior district cores, and avoiding incumbent contests. *Id.; see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983). In the context of population disparities among political districts, the objective to favor voters of one political party over voters of another political party is discriminatory and contrary to the plain language of this Court in *Roman*.

Forty years after *Roman*, this Court confirmed that redistricting plans that deviate from population equality to advantage one political party have a discriminatory taint and must be struck down. *Larios v. Cox*, 305 F. Supp. 2d 1335, 1339 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004). *Larios* reiterates that this Court has not created a ten percent safe harbor by which all redistricting plans are inherently constitutional and, in fact, the discriminatory treatment of one political party, to the advantage of another, is not a legitimate reason for population inequality. *Id.* at 1339-40. Political

gain need not be the sole reason for the population deviation; it is enough if partisanship infects the redistricting process with a taint of arbitrariness or discrimination. *Id.* at 1338. For example, in *Larios*, the Court "found that the deviations were systematically and intentionally created (1) to allow rural southern Georgia and inner-city Atlanta to maintain their legislative influence even as their rate of population growth lags behind that of the rest of the state; and (2) to protect Democratic incumbents." *Id.*

Cases such as *Larios* and the one person, one vote cases being brought by *amicus* in North Carolina are very different from political gerrymandering claims[5] and, pursuant to one person, one vote analysis, have a well-established framework for judicial review. "The sound reasons for judicial hesitation to remedy partisan gerrymandering within equal population do not fit the different wrong of systematic population inequality for partisan advantage with no other justification." *Harris*, 993 F. Supp. 2d at 1098-99 (Wake, J., dissenting). The dissent of the lower court is also consistent with the language of *Larios* that was summarily affirmed by this Court: "The value at issue today is an individualized and personal one, and therefore the offense to the Equal Protection that occurred in this case is more readily apparent than in a claim involving gerrymandering." *Larios*, 305 F Supp. 2d at 1351, *aff'd*, 542 U.S. 947 (2004).

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[5] *Amicus* believes that partisan gerrymandering claims are justiciable, which was affirmed by a majority of the Court in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), but is not currently litigating any cases asserting such claims.

Interpreting *Larios* correctly, the dissenting judge below found that partisan political gain cannot be a legitimate interest in diverting from population equality. "Partisan advantage is not itself a justification for systematic population inequality in districting. No authority says it is, and neither does the Commission or any judge of this Court." *Harris*, 993 F Supp. 2d at 1090-91 (Wake, J., dissenting). "Of course, this Court has *never suggested* that certain geographic areas or *political interests* are entitled to disproportionate representation." *Abate*, 403 U.S. at 185 (emphasis added). Never has this Court granted unfettered discretion to map-drawers to deviate from population equality for political gain and it should not do so now.

The proper test for determining when political party preference unconstitutionally motivates population deviations in a redistricting plan was articulated by the dissent below:

> The law should defer to state districting authorities' actual, substantial, and honest pursuit of a legitimate means for a legitimate purpose with systematic population inequality, notwithstanding the actual and additional motive of party preferment. *But the valid motive must fairly cover the entirety of the otherwise wrongful inequality.*

Harris, 993 F Supp. 2d at 1106 (Wake, J., dissenting). Thus, if a valid motive does not predominate over an improper purpose, such as partisanship, and that valid motive does not explain

the deviations, then a redistricting plan is discriminatorily tainted and inconsistent with *Roman v. Sincock*. *See* 377 U.S. at 710.

Indeed, this test is consistent with this Court's ruling that "population variances in legislative districts are tolerated only if they are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 519 (2006) (internal citations omitted). The implications of this decision, and the test this Court ultimately adopts, will impact the redistricting process nationwide. Nowhere are the effects of that national scope more apparent than in North Carolina.

B. Allowing Partisan Advantage to Justify Increased Population Deviations Will Essentially Create a Safe Harbor for Deviations Up to Ten Percent and Will Greenlight the Improper Weighting of Votes Based on Voting Behavior

One needs only to look at current litigation in North Carolina to see how far legislatures are willing to go to use population deviations to create political advantage.[6] These manipulations of

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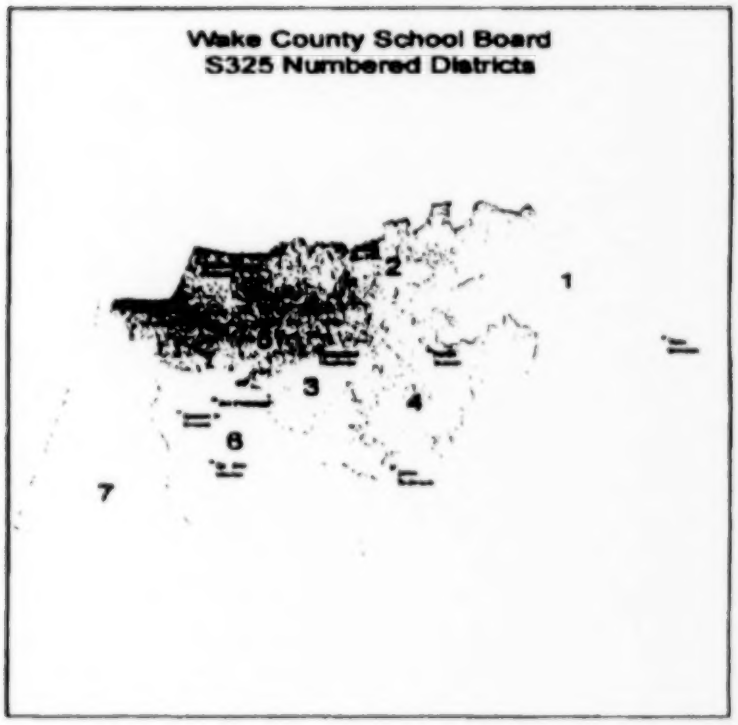
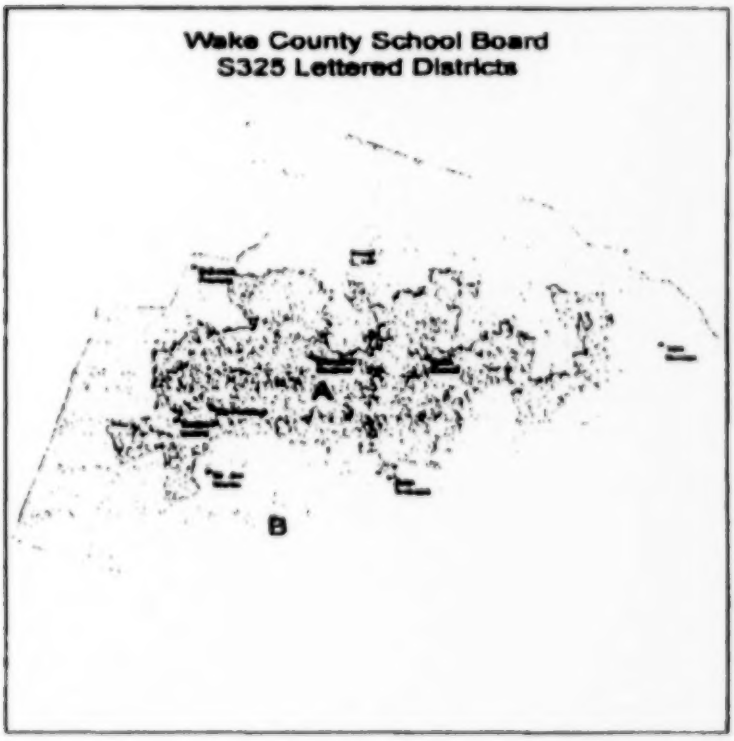
[6] *See Raleigh Wake Citizens Ass'n. v. Wake County Bd. of Elections*, No. 5:15-CV-156 (E.D.N.C. June 5, 2015); *Wright v. North Carolina*, 5:13-CV-607 (E.D.N.C. August 22, 2013); *City of Greensboro v. Guilford County. Bd. of Elections*, No. 1:15-CV-550 (M.D.N.C. July 13, 2015). *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014), *vacated*, 135 S. Ct. 1843 (2015); *Covington v. North Carolina*, 1:15-CV-00399 (M.D.N.C. July 24, 2015).

districts for partisan reasons have often occurred in mid-decade redistricting schemes and have focused on local jurisdictions.

Until 2013, Wake County, North Carolina had a nine member school board that was elected from single-member districts. *Wright v. North Carolina*, 787 F.3d 256, 259 (4th Cir. 2015). In 2011, the *majority Republican* school board redrew its districts, which were geographically compact and had a maximum population deviation of 1.66%. *Id.* at 260. The fall 2011 elections under this plan resulted in a Democratic majority on the school board. *Id.* After that election, in 2013, the Republican-controlled General Assembly, over the objection of the majority of the school board, passed a new redistricting plan (effective in 2016) for solely the Wake County School Board. *Id.* The local bill (S235) changed the nine at large districts to seven single-member numbered districts and two lettered "super-districts," with an overall deviation of 9.8%. *Id.* The donut-shaped super-districts overpopulated the urban part of the county that voted predominantly Democratic and underpopulated the rural and suburban parts of the county that voted Republican. *Id.* The bizarreness of the districts' shapes is readily apparent:

Wake County School Board
Current Districts
7
6
1
9
4
5
8
2


Wake County School Board
S325 Numbered Districts
1
2
3
4
5
6
7


Wake County School Board
S325 Lettered Districts
A
B

"Wake County is thus burdened with some substantially over-populated districts, where votes will be diluted vis-à-vis other substantially under-populated districts." *Id.* It is no surprise, as an example, that super-district B, which is majority-Republican, is underpopulated by -4.90% and super-district A, which is majority-Democratic, is overpopulated by +4.90%.[1] Based on 2012 election data, although President Obama won a majority of the nine districts in the 2011 plan, he would not have won a majority of the districts under the 2013 local bill.[2]

It is clear that partisan gamesmanship in overpopulating Democratically-leaning areas to the benefit of underpopulated Republican areas was part of the intent behind the bill. The Fourth Circuit correctly found that, "Plaintiffs allege such a 'taint of arbitrariness or discrimination'...as in *Larios*, [where] a state legislature designed a redistricting plan with a maximum deviation in population just under 10%, designed to pit rural and urban voters against one another, and intended to favor incumbents of one political party over those of another." *Wright*, 787 F.3d at 267 Voters in Wake County (and elsewhere), some of whom have had their votes discounted for political gains, are harmed by this redistricting strategy, which is contrary to the plain language of this Court: "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and separate treatment, value one person's vote over that of another." *Bush*

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[1] *See Wright v. North Carolina*, 5:13-CV-607 (E.D.N.C. August 22, 2013), Doc. 1, pp. 17-19.

[2] *Id.* at p. 18.

v. Gore, 531 U.S. 98, 105-06 (2000). The arbitrary and discriminatory strategy evident in *Wright* is not the only example in North Carolina.

In 2014, the majority Republican General Assembly passed a local bill to redistrict the Wake County Board of County Commissioners. *Raleigh Wake Citizens Ass'n. v. Wake County Bd. of Elections*, No. 5:15-CV-156 (E.D.N.C. June 5, 2015), Doc. 22, p. 1. In *Raleigh Wake*, the present system of electing county commission members is an at-large system with residency districts. *Id.* at 7. As in *Wright*, in 2011, the *majority-Republican* county commission redrew its residential districts to have a minimal overall population deviation even though, with at-large elections, the residency districts did not need to be the same size. The 2014 election resulted in a Democratic sweep of the open county commission seats. *Id.* at 7-8.[3] In political retaliation, the General Assembly, as in *Wright*, passed a local bill (2015 N.C. Sess. Laws 2015-4) to create seven single-member districts and two super-districts. *Id.* at 8.

The *Raleigh Wake* plan contains identical deviations to the *Wright* redistricting plan, with population deviations of 7.11% for the seven single-member districts and 9.8% for the super-districts. *Id.* at 10. In the middle of the decade, and after a huge Republican loss under a system devised by a Republican-leaning local government, the majority

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[3]*See Wake County, NC General Election Official Results*, (Nov. 4, 2014), http://www.wakegov.com/elections/data/Past%20Election%20Results/2014-11-04%20-%20General%20Election/2014.11.04.Summary.htm.

majority Republican General Assembly again injected itself into the local redistricting process to more heavily weight the votes of Republican voters in the county.

Two months after the *Raleigh Wake* redistricting plan was passed by the General Assembly, the legislature employed this discriminatory strategy yet again by passing a local redistricting plan for the City of Greensboro's city council. *City of Greensboro v. Guilford County. Bd. of Elections*, No. 1:15-CV-550 (M.D.N.C. July 13, 2015), Doc. 1, p. 1. Previously, the city council was made up of three members elected at-large and five council members elected from single-member districts; the local bill, which was preliminary enjoined by the district court,[4] created eight handcrafted single-member districts. *Id.* at 13. These districts do not comport with traditional redistricting criteria and create an overall population deviation of 8.25%, compared to 3.95% under the previous plan. *Id.* at 15.

Political gain for Republicans was again at the heart of this plan. "The reason for the 8.25% overall population deviation in this plan is to disadvantage certain incumbents because of their party affiliation....The 8.25% overall population deviation was also caused by the desire to maximize the voting strength of Republican voters and minimize the voting strength of Democratic voters." *Id.* at 16. Only one member of the city council is a Republican,

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[4] *City of Greensboro v. Guilford County. Bd. of Elections*, No. 1:15-CV-550, 2015 U.S. Dist. LEXIS 95972 (M.D.N.C. July 23, 2015).

and while this member was not paired with another incumbent in the General Assembly's plan, six out of seven Democratic members were paired with another Democratic incumbent. *Id.* at 17. Further, the lone Democrat who was not paired is now in a district that voted 59.6% straight-ticket Republican in the 2010 General Election. *Id.*

This political gamesmanship is the sort of discriminatory treatment of voters forbidden in *Reynolds*, *Roman*, and *Larios*. It strikes at the heart of the franchise. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. If this Court finds that partisan advantage is a legitimate justification for the population deviations seen in the instant case, it will create a safe harbor for the kinds of machinations seen in these North Carolina cases. Such strategies are arbitrary, discriminatory, and contrary to everything one person, one vote is meant to protect.

CONCLUSION

For the reasons articulated above, and in order to ensure that federal law continues to protect the individual rights of voters from arbitrary and discriminatory devaluing of their votes, *amicus* respectfully requests that the Court hold that partisan considerations do not justify larger than necessary population deviations among districts.

Respectfully submitted,

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No. 14-232

IN THE

Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR AMICI CURIAE PROFESSORS NICHOLAS STEPHANOPOULOS AND SIMON JACKMAN, ELECTION LAW SCHOLARS, IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

Professor Nicholas Stephanopoulos and Professor Simon Jackman are election scholars who study partisan gerrymandering. They have a professional interest in the proper disposition of challenges to redistricting plans and believe that such challenges should be decided with the benefit of a reliable measure of a given plan's partisan symmetry.

Professor Stephanopoulos is Assistant Professor of Law at the University of Chicago Law School. His research and teaching include the fields of election law, constitutional law, legislation, administrative law, comparative law, and local government law. Together with Dr. Eric McGhee, he has developed a quantitative measure of partisan symmetry called the "efficiency gap" and has computed this gap for both congressional and state house plans over the entire modern redistricting era, from 1972 to 2012. *See* Stephanopoulos & McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015).

Professor Jackman is Professor of Political Science and, by courtesy, Professor of Statistics at Stanford University. He is also a fellow of the Society for Political Methodology and a member of the American Academy of Arts and Sciences. He teaches courses on

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[1] By letters on file with the Clerk, all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than amici, their members, or their counsel made such a monetary contribution.

American politics and statistical methods in the social sciences. His expert report on Wisconsin's redistricting plan, which includes efficiency gap calculations from 1972 to 2014, was recently filed in pending litigation. *See* Jackman Report, Pls.' Ex. 3, ECF No. 1-3, *Whitford* v. *Nichol*, 3:15-cv-421-bbc (W.D. Wis. July 8, 2015).

Amici write to show that: (1) Arizona's plan does not exhibit symmetry scores indicative of pro-Democratic partisan intent; and (2) small deviations in district population size do not reliably indicate a partisan gerrymander.

SUMMARY OF ARGUMENT

A partisan gerrymander is a redistricting scheme that helps one party translate its popular support into legislative power more efficiently than its rival. This greater efficiency in converting votes into seats is accomplished by creating districts in which that party does not "waste" as many votes—either by losing seats or by winning seats by unnecessarily high margins—as its adversary. By denying the other side a share of seats that fairly reflects its level of statewide backing, a gerrymander undermines the election's democratic legitimacy and distorts the policies eventually enacted by the legislature.

While many scholars support the use of partisan symmetry to assess district plans, the question has been how to measure symmetry empirically. The "efficiency gap," advanced by amici here, measures symmetry by comparing the parties' respective shares of wasted votes in actual elections. This newer metric overcomes the major criticisms of the primary alternative metric proposed in the past: "partisan bias."

Under either metric, the Arizona plan before the Court somewhat favors Republicans, exhibiting a pro-Republican efficiency gap of 5% and a pro-Republican partisan bias of 8.5% over the 2012 and 2014 elections. These partisan symmetry scores do not support the inference appellants would have the Court draw that the plan was designed with the aim of benefiting *Democratic* candidates.

Finally, although the Arizona plan features minor variations in district population size, a broad statistical comparison of state house plans reveals no meaningful correlation between population deviation and either the efficiency gap or partisan bias. Comprehensive electoral data and sophisticated computer modeling are the standard tools of most gerrymanders, and these tools readily permit states to minimize deviation while advancing partisan ends.

ARGUMENT

I. ARIZONA'S REDISTRICTING PLAN DOES NOT EXHIBIT SYMMETRY SCORES INDICATIVE OF PRO-DEMOCRATIC PARTISAN INTENT

In any election, there are two kinds of votes that do not help a party win additional seats: votes that are cast for a losing candidate and votes that are cast for a winning candidate beyond the threshold required for victory. In that sense, these are "wasted" votes. A partisan gerrymander favors a party in statewide elections by reducing the number of votes the party wastes compared to its adversary. Under a neutral plan, neither side wastes significantly more votes than the other, and consequently a given percentage of the statewide vote yields about the same share of seats, regardless of the party for whom the votes are cast. As

this Court has acknowledged, severe partisan gerrymanders entrench a party in power and thereby violate "democratic principles." *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quoting *Vieth* v. *Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); *id.* at 316 (Kennedy, J., concurring in the judgment)).

Although the Court has held gerrymandering claims to be justiciable, it has yet to adopt a substantive standard to apply in these cases. *See League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 413-414 (2006) ("*LULAC*"). The concept of symmetry has garnered a strong consensus among scholars and is supported by decades of research. *See* Brief of Amici Curiae Professor King et al. in Support of Neither Party 6-7, *LULAC*, 548 U.S. 399 (No. 05-204) (citing sources). Members of the *LULAC* Court expressed an interest in symmetry as a promising theory. 548 U.S. at 466-468 (Stevens, J., concurring in part and dissenting in part), 483-484 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part), 491-492 (Breyer, J., concurring in part and dissenting in part). The question remains how to measure symmetry.

Justice Kennedy, while not "altogether discounting [symmetry's] utility in redistricting planning and litigation," has identified a number of concerns about using the "partisan bias" metric proposed by amici in *LULAC*. 548 U.S. at 419-420 (plurality opinion). Partisan bias measures symmetry by reference to the results of a hypothetical election in which the parties evenly split the statewide vote. The major criticisms of this metric concern assumptions about shifting voter preferences that are made in order to generate this imaginary tie.

The "efficiency gap," a newer metric advanced by amici here, answers these criticisms by comparing the parties' respective shares of wasted votes in actual elections. By either metric, there is no indication that the Arizona plan before the Court favors Democratic candidates—and, hence, no support for the inference that the plan's motivation was Democratic partisan advantage.

A. The Efficiency Gap Provides A Reliable Metric Of Symmetry That Addresses Critics' Concerns About Partisan Bias

As noted, a partisan gerrymander unfairly enhances one party's ability to translate its votes into electoral victories. The typical gerrymander works by a combination of "packing," *i.e.*, clustering voters for the disfavored party into a few safe districts for that party, and "cracking," *i.e.*, dispersing the remainder of those voters throughout districts won by the favored party. In a two-candidate race, the losing candidate's votes—as well as the winning candidate's votes in excess of the 50% (plus one) threshold required to carry the seat—could be put to better use securing victories in other districts. For that reason, if a party's goal is to maximize the seats it wins in any given election, both lost and surplus votes are "wasted." At bottom, a partisan gerrymander is a redistricting plan that ensures that one party will exploit its popular support more efficiently than its rival, wasting fewer votes and thus securing more seats with the votes it receives.

1. By focusing on wasted votes, the efficiency gap goes to the essence of partisan gerrymandering

The value of analyzing partisan gerrymandering in terms of the "efficiency gap" lies in combining into a single figure a comparison of the parties' respective shares of wasted votes. This comparison reflects the series of packing and cracking decisions built into a state's redistricting plan. Because the core issue in gerrymandering cases is the difference between the two parties' abilities to convert their votes into seats, the efficiency gap provides a metric that reflects the actual mechanism that produces asymmetry.

The efficiency gap is computed in two steps—by first summing the votes each party wastes in an election and then dividing the difference between the two sums by the total number of votes cast. *See* Jackman Report 15-19. To take a simple example, suppose that in a state with 10 districts of 100 voters each, Party A receives 70 votes in districts 1-3, 54 votes in districts 4-8, and 35 votes in districts 9-10, with the remaining votes being won by Party B. Party A wins the election but, as in any single-member district system, still ends up wasting a substantial number of votes—150 votes in all (20 in districts 1-3, 4 in districts 4-8, and 35 in districts 9-10). Party B, however, wastes many more votes—350 votes in all (30 in districts 1-3, 46 in districts 4-8, and 15 in districts 9-10). The resulting efficiency gap, *i.e.*, the difference between the two parties' sums of wasted votes divided by the total number of votes cast, is 0.2, or 20% ((350-150)/1000). For a detailed chart, see Stephanopoulos & McGhee, 82 U. Chi. L. Rev. at 852.

A key property of the efficiency gap is that it reveals a party's excess share of seats relative to a neutral plan. *See* Jackman Report 19. In the above example, Party A receives 550 votes and wins 8 seats, capturing 80% of the districts with 55% of the statewide vote. An efficiency gap of 20% indicates that, out of the 10 races, Party A won 2 (0.2×10) it would otherwise have lost had there been an efficiency gap of zero. A neutral district plan would award 6 seats to Party A. In comparison, the state's plan confers a competitive advantage sufficient to account for 2 extra seats. Giving one party the discrepant power to amass additional seats relative to its share of votes is the crux of a partisan gerrymander.

2. The efficiency gap addresses the major criticisms of partisan bias

The longstanding precursor to the efficiency gap is the metric proposed by other amici in *LULAC*: partisan bias. In contrast to the efficiency gap, which focuses on the parties' wasted votes in actual elections, partisan bias measures asymmetry by looking at the divergence in the share of seats each party would win in a hypothetical election in which the two parties received the same share—normally half—of the statewide vote. *See* Jackman Report 11-13. For example, if Democrats would win 55% of the seats with 50% of the vote, then the district plan has a 5% pro-Democratic bias.

While partisan bias is unquestionably useful in identifying asymmetry, scholars and this Court have noted some of the metric's potential pitfalls. *LULAC*, 548 U.S. at 420 (plurality opinion). The efficiency gap avoids these pitfalls by comparing the parties' abilities to convert votes into seats in actual elections.

In the extraordinary circumstance where the two parties split the statewide vote down the middle, the efficiency gap and partisan bias are identical. Even in that special case, however, the two metrics measure different things. Partisan bias measures the skew in outcome by reference to the results of a hypothetical tie. It so happens that because the parties *did* tie, the election results make conjecture unnecessary. The efficiency gap, on the other hand, measures the manipulation of wasted votes that leads to the skewed outcome in the first place. In any election that is not tied, the two metrics diverge, and the further an election is from being tied, the more they diverge. *See* Stephanopoulos & McGhee, 82 U. Chi. L. Rev. at 856-857.

The shortcomings of partisan bias stem from the need to compute the results of a tied election, which in all but the rarest cases is *counterfactual*. *See* Jackman Report 14-15. To compute a plan's bias, the parties' vote shares must be shifted in some way to generate an imaginary 50-50 split. The classic way to accomplish this is to assume a uniform swing in votes to the losing party. *See id.* at 13-14. A major criticism of partisan bias is that this uniform swing assumption is unrealistic and depends on "conjecture about where possible vote-switchers will reside." *LULAC*, 548 U.S. at 420 (plurality opinion). Because the makeup of districts is not homogeneous, vote-shifters are unlikely to be spread evenly throughout the state; hence, any shift in the statewide vote is likely to be the product of uneven shifts among districts. *See* Stephanopoulos, *Spatial Diversity*, 125 Harv. L. Rev. 1903, 1940-1941 (2012). Although the assumption of uniformity can be relaxed and made more sophisticated, *see* Grofman & King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After* LULAC *v.* Perry, 6 Elec-

tion L.J. 1, 4 (2007), the problem to some extent persists, *see* Stephanopoulos & McGhee, 82 U. Chi. L. Rev. at 859-860.

In competitive elections, in which the parties' statewide vote shares are within 10 points of each other, partisan bias works well. McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 Legis. Stud. Q. 55, 67 (2014). In uncompetitive elections, however, the uniform swing assumption is sufficiently implausible to make the metric unreliable. Even proponents of partisan bias admit that the method is not useful below a certain threshold of competitiveness. *See* Grofman & King, 6 Election L.J. at 19. But gerrymandering remains an issue in states that strongly favor one party. Indeed, a gerrymander may permit the already dominant party to achieve the supermajority needed for extraordinary legislative measures.

The efficiency gap does not have these issues because it does not require any counterfactual analysis. The crucial input is the difference between the parties' wasted votes in the *actual* election. So long as election results are available at the district level, calculating the efficiency gap is straightforward. The process does not entail unrealistic assumptions about how vote-shifters are distributed throughout the state. And it can be meaningfully calculated even for uncompetitive elections in states dominated by a single party.

3. Historical data on state plans' efficiency gaps provides a way to assess an existing plan's partisan implications

The efficiency gap has been computed for congressional and state house results over the entire modern redistricting era, from 1972 to 2014.[2] *See* Stephanopoulos & McGhee, 82 U. Chi. L. Rev. at 867-873; *see also* Jackman Report 19-21. As a result, there is a large dataset from which to draw empirically based conclusions about both the history of gerrymandering and the partisanship of district plans currently in use.

By measuring the real source of competitive advantage—*i.e.*, disparities in the parties' respective shares of wasted votes—the efficiency gap can provide "clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights." *Vieth*, 541 U.S. at 307-308 (Kennedy, J., concurring in the judgment). Although devised only in the past few years, this metric is already being employed in gerrymandering litigation. *See* Jackman Report.

There are two related challenges in gerrymandering cases that this dataset allows election experts, litigants, and courts to overcome. First, since virtually any plan will create some imbalance in an election, there needs to be a way to set thresholds above which an efficiency gap is truly large and problematic. Second, and relatedly, voters' preferences change from one

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[2] The primary dataset developed by Stephanopoulos and McGhee uses congressional plans with at least 8 seats and single-member state house races because the efficiency gap is more difficult to reliably calculate for smaller plans and multimember districts. *See* Stephanopoulos & McGhee, 82 U. Chi. L. Rev. at 868.

election to the next; hence, one has to take into account these swings to distinguish plans whose efficiency gap indicates a durable asymmetry from plans whose gap is likely to unravel over their own lifetimes. From the standpoint of partisan symmetry, only those plans whose efficiency gap is large and likely to persist over multiple elections merit judicial intervention.

The first challenge (*i.e.*, "determining when political gerrymandering has gone too far") has long been recognized as "[t]he central problem" in gerrymandering cases. *Vieth*, 541 U.S. at 296-297 (plurality opinion). For both congressional and state house races, however, the dataset includes the historical as well as current distribution of state plans' efficiency gaps and thus can greatly inform the choice of reasonable thresholds of presumptive unconstitutionality. *See* Stephanopoulos & McGhee, 82 U. Chi. L. Rev. at 885-891; Jackman Report 56-59, 63-69.

As to the second challenge, a plan's efficiency gap in one election is not necessarily a strong predictor of its gap in the next. Some plans nevertheless feature large and durable gaps over several elections. Stephanopoulos & McGhee, 82 U. Chi. L. Rev. at 864-865. Sensitivity testing can be used to ascertain the likely persistence of a large asymmetry. That testing uses the magnitude of historical swings in voter preferences to estimate the likelihood that a plan will remain skewed over its lifetime. *Id.* at 889-890. In addition, the durability of a plan's efficiency gap is linked to the gap's initial size. Given this initial size, the probability that a plan will feature a consistent tilt can be accurately estimated. *See* Jackman Report 56-69.

In sum, the efficiency gap offers a reliable metric of partisan symmetry that is empirical, easily calculable,

and impervious to the major criticisms of partisan bias. The data already compiled on plans' gaps over the last four decades also helps to render tractable the challenges in operationalizing this metric in litigation.

B. Neither Metric Supports The Inference That Arizona's Redistricting Plan Was Designed To Benefit Democratic Candidates

The data on efficiency gaps in congressional and state house races from 1972 to 2014 supports three background conclusions pertinent to this case. First, as a historical matter, most district plans are reasonably balanced and reasonably likely to favor different parties at different points during their ten-year lifespans. Second, only in recent years has the average efficiency gap increased noticeably. And, finally, most of the litigation that has so far been brought has not targeted state plans with truly large and durable efficiency gaps. *See* Stephanopoulos & McGhee, 82 U. Chi. L. Rev. at 875-877; Jackman Report 44-47.

Where does the Arizona plan before the Court fit into this overall picture? Figures 1 and 2 show the distributions of state house plans' efficiency gaps and partisan biases over the entire 1972-2014 period as well as in the 2012 and 2014 elections. Despite the uptick in the level of partisan gerrymandering nationwide, Arizona belongs to a large group of 22 states whose current plans are only modestly asymmetrical, as measured by their average absolute efficiency gap. *See* App.[3] Specifically, as shown in Figure 1, the Arizona

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[3] These 22 states have an absolute efficiency gap less than or equal to Arizona's. *See* App.

plan has a gap of -5%. *Id.*[4] Republicans waste 5% fewer votes than Democrats and, thus, win 3 seats (0.05 × 60 seats) in excess of their share under a neutral plan with an efficiency gap of zero.

As shown in Figure 2, the Arizona plan also tilts in Republicans' favor as measured by partisan bias. The plan's bias, when averaged over 2012 and 2014, is -8.5%. App. Thus, in a hypothetically tied election, where each side received exactly half of the statewide vote, Republicans would be expected to pick up 58.5% or 35 (0.585 x 60) of the state house seats.

Regardless of the metric used, there is no indication that the Arizona plan favors Democratic candidates, either taken on its own or in comparison with most other state house plans. Again, the plan's average efficiency gap is modestly pro-Republican, and its average partisan bias is noticeably (if not egregiously) so. Similarly, of the 40 state plans surveyed, at least 25 are more pro-Democratic by each metric. Republicans con-

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[4] In many states, including Arizona, there are a number of uncontested elections. These pose a problem for any measure of partisan symmetry because the parties' vote shares are unknown and must be estimated. Vote shares are typically imputed to districts with uncontested elections by using presidential races, the results of previous years when the seats were contested, or other variables shown to be good predictors. *See* Stephanopoulos & McGhee, 82 U. Chi. L. Rev. at 865-867; Jackman Report 24-32. Elections in multimember districts pose a similar problem when a party does not field enough candidates to fill the available seats.

Arizona, which has 30 two-member state house districts, had several such uncontested or "under-contested" races in 2012 and 2014. In these cases, vote shares have been estimated using a model based on the presidential vote in each state house district. *See* Jackman Report 26-28.

sequently fare better under Arizona's plan than under most states' plans. *See* App.

These partisan symmetry scores do not "speak for themselves" as signs of pro-Democratic intent. *Larios* v. *Cox*, 300 F. Supp. 2d 1320, 1330 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004). On the contrary, insofar as partisan effect is probative of partisan intent, the scores undermine appellants' claim that the Arizona plan was designed with the motive of assisting Democrats.

Fig. 1. State House Plans' Efficiency Gap Scores

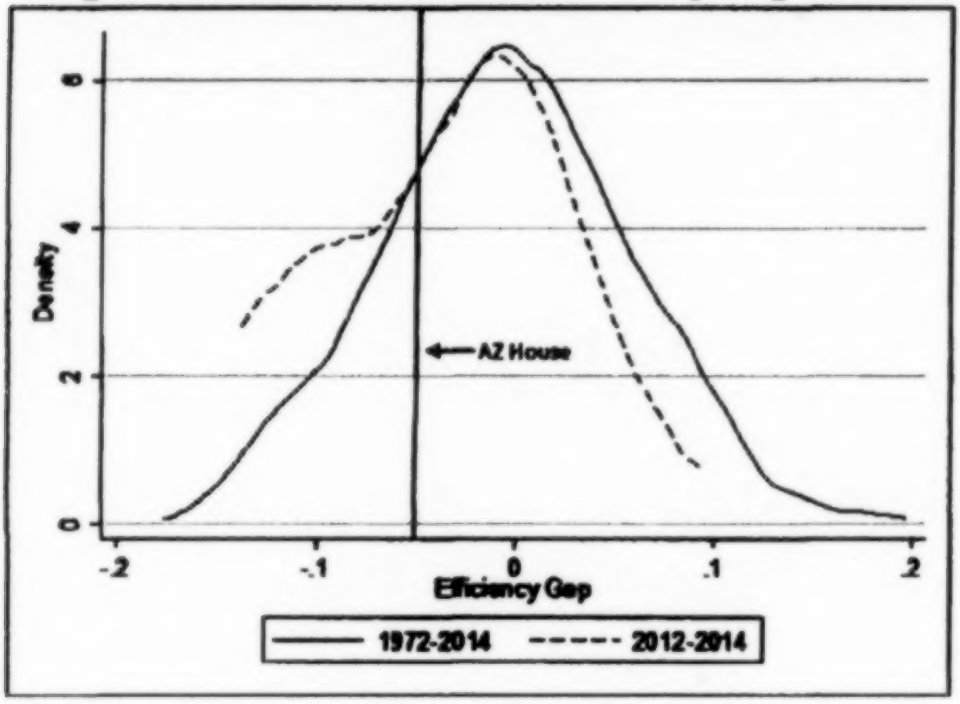
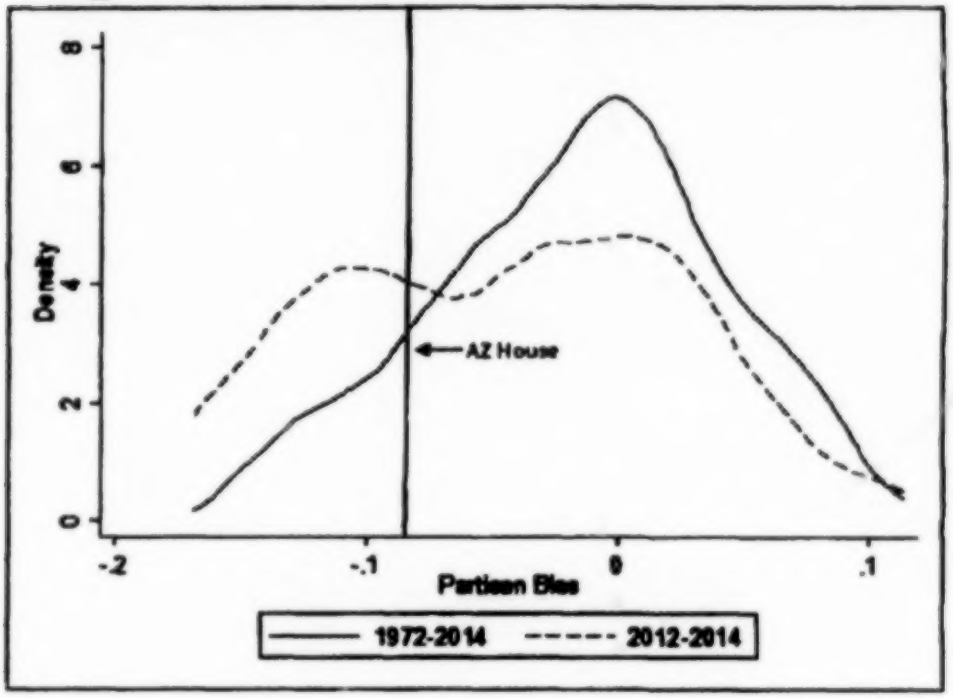


Fig. 2. State House Plans' Partisan Bias Scores



II. Population Deviation Does Not Reliably Indicate A Partisan Gerrymander

Members of this Court have long recognized that redistricting plans can harm political opponents even when those plans scrupulously adhere to the rule of "one person, one vote." *See Davis* v. *Bandemer*, 478 U.S. 109, 174 (1986) (Powell, J., concurring in part and dissenting in part); *Karcher* v. *Daggett*, 462 U.S. 725, 752 n.10 (1983) (Stevens, J., concurring); *id.* at 776 (White, J., dissenting); *id.* at 785 (Powell, J., dissenting). Analysis of state plans' efficiency gap and partisan bias scores supports a further conclusion: deviation in district population size is not at all statistically correlated with any increase in partisan asymmetry. Rather, in recent decades, block-by-block census data and more advanced computer software have provided the sophisticated, readily available tools by which modern district

plans are able to accomplish partisan ends without substantially varying district population.

A. There Is No Correlation Between Population Deviation And Partisan Asymmetry

Departures from perfect equality among voters may be constitutionally suspect independent of a plan's partisan effects, at least if those departures are sufficiently large to implicate the requirement of "one person, one vote." *Reynolds* v. *Sims*, 377 U.S. 533, 579 (1964) ("[T]he overriding objective must be substantial equality of population among the various districts[.]"). But deviations from numerical equality in no way relate to partisan asymmetry under either metric. Figures 3 and 4 illustrate the point.

Fig. 3. Population Deviation vs. Efficiency Gap

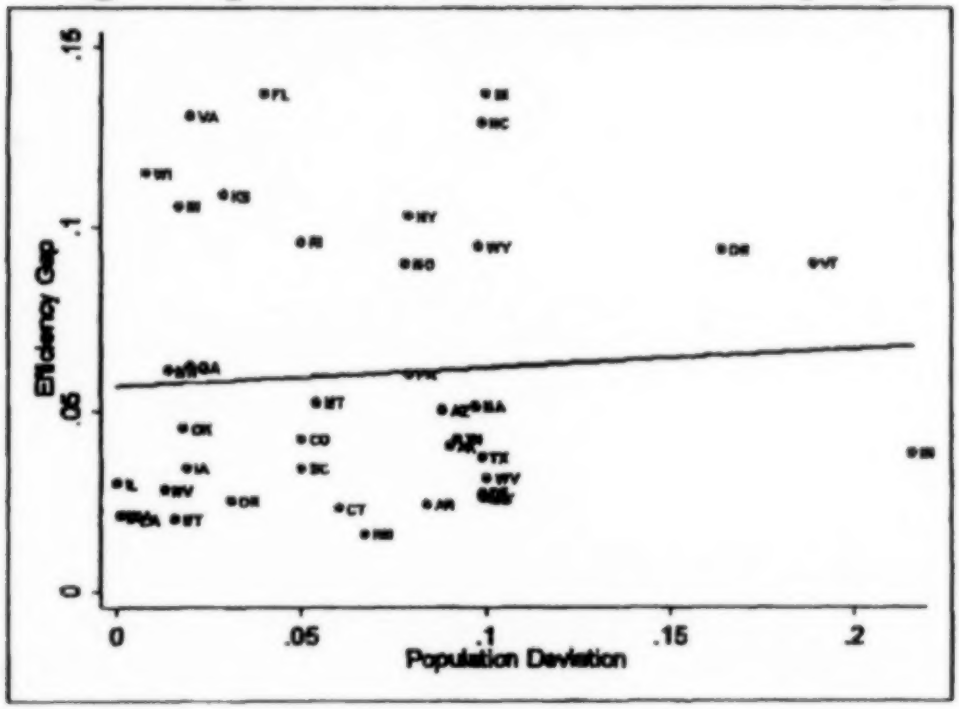
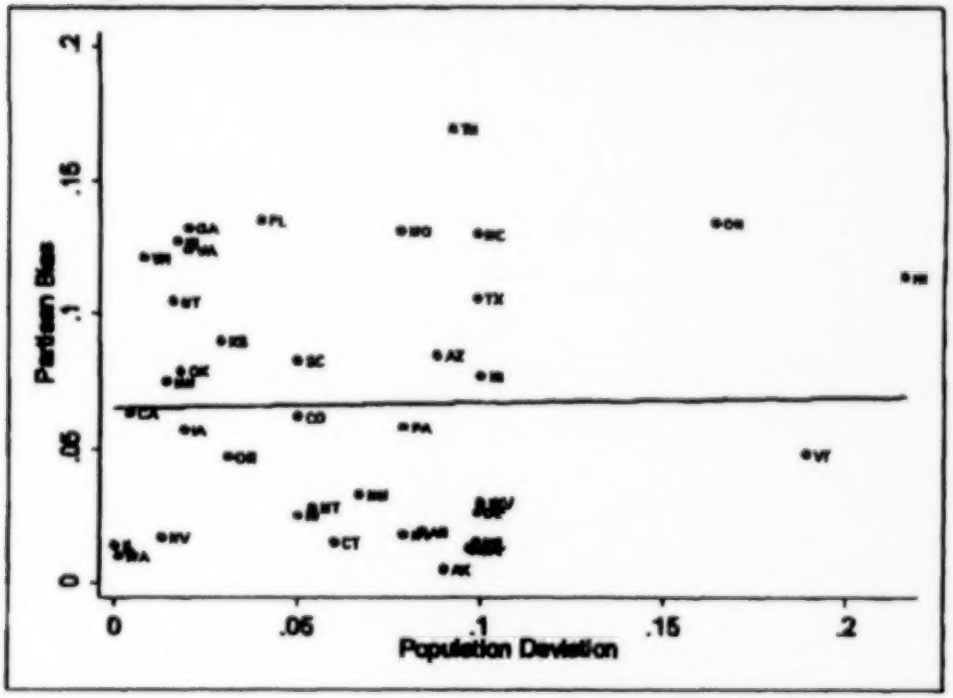


Fig. 4. Population Deviation vs. Partisan Bias



In each figure, population inequality is plotted horizontally, while partisan asymmetry is plotted vertically, with both variables being measured in absolute values.[5] The best fit line drawn through the middle of the respective scatterplots expresses the relationship between the two variables. How well the line fits the data indicates the strength of the correlation between population inequality and partisan asymmetry—from not correlated at all (0) to perfectly correlated (1 or -1). The more tightly the points are clustered along the line, the stronger the correlation; conversely, the more random the distribution, the weaker the correlation. In addition, the line's slope reveals how change in popula-

[5] For purposes of identifying a correlation, the sign (-/+) of the deviation from the median population (under/over) and of the partisanship (Republican/Democrat) is immaterial.

tion inequality is linked to change in partisan asymmetry in general.

Here, the variables are, for all practical purposes, unrelated. In both cases, the correlations are virtually indistinguishable from zero: 0.07 for the efficiency gap and 0.02 for partisan bias. The slope of each best fit line is also essentially flat. In other words, statistically speaking, population deviation has no bearing on a plan's efficiency gap or partisan bias. With respect to the efficiency gap, some states with little variation in population have large efficiency gaps (*e.g.*, Florida, Indiana, Kansas, Virginia, and Wisconsin), while others with wide variance have small gaps (*e.g.*, Delaware, Kentucky, Maine, and West Virginia). Fig. 3. The same non-relation holds true for partisan bias. There are states with high bias scores that preserve almost uniform population (*e.g.*, Georgia, Indiana, Virginia, and Wisconsin) as well as states with low to moderate bias but large population deviation (*e.g.*, Kentucky, Maine, Massachusetts, Vermont, and Wyoming). Fig. 4.

Many state house plans have populations that deviate by about 10%—the threshold below which such plans are presumptively constitutional. *See Brown* v. *Thomson*, 462 U.S. 835, 842 (1983). States in that situation, however, run the entire gamut of symmetry scores. Figs. 3 & 4. For example, Delaware and North Carolina have the same population deviation (9.9%), but Delaware has a modest efficiency gap and partisan bias, while North Carolina scores very poorly on the efficiency gap and partisan bias alike. App. Virginia and Wisconsin are similar to North Carolina in having significant partisan asymmetry under both metrics, but, unlike North Carolina, Virginia has relatively little population deviation, and Wisconsin almost none. *Id.*

In sum, equality among district voters—however desirable in its own right—does not track partisan gerrymandering in any meaningful way.

B. Gerrymandering Typically Involves Little Or No Deviation In Population Size

The lack of correlation between population deviation and either the efficiency gap or partisan bias comes as no surprise. State plans designed to achieve partisan ends can do so without substantially varying district population. Instead, they shift district boundaries, bringing in and excluding selected voters in equal measure with a high degree of precision. As the Court explained just this past Term, equal population is not itself a conventional line-drawing criterion but, rather, "part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to how equal population objectives will be met." *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1270 (2015).

The Texas plan struck down in *LULAC* under Section 2 of the Voting Rights Act demonstrates the basic process by which voters may be packed and cracked to dilute a group's influence in a district without altering population size. 548 U.S. 399. In District 23, whose electorate comprised 57.5% Latinos, the incumbent was at risk of losing his state seat because he received only 8% of the Latino vote. To protect the seat, the legislature redrew the district—by first shifting 100,000 Latinos to nearby District 28, itself heavily Latino, and then offsetting the lost population in District 23 with additional voters from largely white Republican counties in central Texas. *Id.* at 423-425, 438-439. District 23 re-

tained the same population, but had an entirely different racial and partisan composition.

Precise demographic shifts of this sort are possible because of the immense data and computing power that are now readily available. The political parties and other organizations keep detailed information on voters—including party registration and voting history—down to the census block.[6] *See* Toobin, *The Great Election Grab*, The New Yorker, Dec. 8, 2003, at 63, 75; *see also* Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. Chi. Legal F. 205, 232 & n.132 (1995). With this information, the right software enables one to view block-by-block breakdowns and to redraw district boundaries while tracking changes in population and likely electoral outcome. Toobin, *The Great Election Grab*, at 75-76. Of course, these tools can also be used to further the goal of neutrality. The fact, however, remains that such tools—not population deviation—are the staple of modern gerrymandering and, indeed, make deviation much easier for the intentional gerrymanderer to avoid. *See* Issacharoff, 1995 U. Chi. Legal F. at 233; *see also* Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 Stan. L. Rev. 731, 736 (1998); Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L.J. 2505, 2553 (1997).

Population deviation, then, is no substitute for accurate measures of a plan's partisan asymmetry. Population disparities do not indicate partisan favoritism.

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[6] Census blocks, which are the smallest level of geography for which the Census Bureau provides demographic data, often consist of a single city block, with voter populations from less than a dozen to around a thousand. Toobin, *The Great Election Grab*, at 75.

Moreover, because states can carefully select voters with tools that monitor for population change, gerrymandering does not depend on such disparities in practice.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

Symmetry Scores of Current State House Plans

State	Efficiency Gap[1]	Absolute Efficiency Gap	Partisan Bias	Absolute Partisan Bias	Total Population Deviation[2]
AK	4.0%	4.0%	0.5%	0.5%	9.0%
AZ	-5.0%	5.0%	-8.5%	8.5%	8.8%
AR	-0.2%	2.4%	-0.7%	1.9%	8.4%
CA	1.3%	2.0%	6.3%	6.3%	0.4%
CO	4.2%	4.2%	6.2%	6.2%	5.0%
CT	-1.1%	2.3%	-1.4%	1.5%	6.0%
DE	-2.3%	2.7%	2.6%	2.6%	9.9%
FL	-13.7%	13.7%	-13.5%	13.5%	4.0%

[1] Both the efficiency gap and partisan bias were first calculated as a raw average of the 2012 and 2014 figures. In a few cases where the sign flipped between elections, the raw value in columns 2 and 4 differs from the absolute value in columns 3 and 5. The former reflects how strongly partisan a state house plan is in a particular direction, while the latter measures the amount of partisanship that the plan has exhibited in either direction.

[2] The data for current state plans' total population deviations comes from the National Conference of State Legislatures (NCSL). *See* NCSL, *2010 NCSL Congressional and State Legislative Redistricting Deviation Table*, http://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx.

State	Efficiency Gap[1]	Absolute Efficiency Gap	Partisan Bias	Absolute Partisan Bias	Total Population Deviation[2]
GA	-6.2%	6.2%	-13.2%	13.2%	2.0%
HI	2.7%	3.8%	11.4%	11.4%	21.6%
IL	-0.6%	3.0%	1.4%	1.4%	0.0%
IN	-10.6%	10.6%	-12.7%	12.7%	1.7%
IA	-3.1%	3.4%	-5.7%	5.7%	1.9%
KS	-10.9%	10.9%	-9.0%	9.0%	2.9%
KY	2.6%	2.6%	2.8%	2.8%	10.0%
ME	2.6%	2.6%	-1.5%	1.5%	9.9%
MA	0.5%	5.1%	1.3%	1.3%	9.7%
MI	-13.7%	13.7%	-7.7%	7.7%	10.0%
MN	-6.1%	6.1%	-7.5%	7.5%	1.4%
MO	-9.0%	9.0%	-13.1%	13.1%	7.8%
MT	0.5%	5.2%	-1.8%	2.8%	5.4%
NV	-0.2%	2.8%	-0.6%	1.7%	1.3%
NM	-1.6%	1.6%	-3.3%	3.3%	6.7%
NY	-10.3%	10.3%	-1.8%	1.8%	7.9%
NC	-12.9%	12.9%	-13.0%	13.0%	9.9%
OH	-9.4%	9.4%	-13.4%	13.4%	16.4%

State	Efficiency Gap[1]	Absolute Efficiency Gap	Partisan Bias	Absolute Partisan Bias	Total Population Deviation[2]
OK	-4.5%	4.5%	-7.9%	7.9%	1.8%
OR	2.5%	2.5%	4.7%	4.7%	3.1%
PA	-6.0%	6.0%	-5.8%	5.8%	7.9%
RI	9.6%	9.6%	-2.5%	2.5%	5.0%
SC	-3.4%	3.4%	-8.3%	8.3%	5.0%
TN	-3.1%	4.2%	-16.9%	16.9%	9.2%
TX	-3.7%	3.7%	-10.6%	10.6%	9.9%
UT	0.3%	2.0%	-10.5%	10.5%	1.6%
VT	9.0%	9.0%	2.0%	4.8%	18.9%
VA	-13.1%	13.1%	-12.4%	12.4%	2.0%
WA	-0.9%	2.1%	1.0%	1.0%	0.1%
WV	-1.4%	3.1%	1.1%	3.0%	10.0%
WI	-11.5%	11.5%	-12.1%	12.1%	0.8%
WY	-9.5%	9.5%	-0.6%	1.2%	9.8%

No. 14-232

In The
Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT
REDISTRICTING COMMISSION, *et al.*,

Appellees.

**On Appeal From The
United States District Court
For The District Of Arizona**

BRIEF OF *AMICUS CURIAE* SAMUEL S. WANG, PH.D., IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Samuel S. Wang, Ph.D., operates the Princeton Election Consortium blog, which since 2004 has been devoted to statistical analysis of election processes and predictions (*see* http://election.princeton.edu/). He is Professor of Neuroscience and Faculty Associate of the Program in Law and Public Affairs, both at Princeton University.

Amicus submits this brief as an individual; institutional affiliation is noted for informational purposes only and does not indicate endorsement by his institutional employer of positions advocated herein.

SUMMARY OF ARGUMENT

This brief proposes that gerrymandering claims like the one in this case should be analyzed by looking at the statewide effect of a redistricting plan, and it offers a method for doing so that is simple, elegant, and well-suited to the task. The method is to compare each party's vote in the median district with each party's average (mean) vote across all districts. A large spread between these two percentages shows that one party's voters have been packed into some

[1] No counsel for a party authored this brief in whole or in part. No person other than *amicus curiae* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

districts, signaling a gerrymandered advantage for the other party. In this case there is no such spread, and in fact Republicans, who are claimed to have been victimized by gerrymandering, are shown to be the modest beneficiaries of the redistricting plan.

ARGUMENT

Appellants in this action contend that the Arizona Independent Redistricting Commission ("Commission") created a slate of districts with unequal population for the express purpose of implementing a partisan gerrymander. The only empirical evidence appellants cite to this Court of any discernible partisan effect of the Commission's map is that in the 2012 election, "legislators elected from districts identified by the Commission as minority ability-to-elect districts were all Democrats" (Appellants' Br. at 17) (citing *Harris*, J.S. App. 37a-38a), and that "the 2014 election [also] demonstrated the commission's desired effect, with Democrats winning twenty-nine out of thirty senate and house seats in the ten ability-to-elect districts."

But it is well known that minority voters in the ability-to-elect districts – Latinos and Native Americans – overwhelmingly support Democrats, so this argument is circular. Of course Democratic-leaning districts systematically elect Democrats, just as the Republican-leaning voters in fourteen districts elected Republicans in all 42 out of 42 Senate and House

races in 2014.[2] The argument misses the distinction between single-district and statewide gerrymandering. A single-district gerrymander eliminates competition in only one race, while statewide gerrymandering consists of a pattern of many single-district gerrymanders that combine to distort the overall outcome. Appropriately testing the empirical proposition that a statewide map systematically disadvantaged Republicans therefore requires a method that adequately takes into account *all* districts.

This brief suggests an approach to determining whether districting has led to a systematic partisan gerrymander. The statewide gerrymanderer's objective is to pack an opposing party's votes into a small number of districts so that the opposing party will win big where it wins even as it wins few districts. Such districting can be expected to result in a specific kind of asymmetry in the distribution of party vote shares across districts: the targeted party will win less than its statewide average vote share in a relatively large fraction of districts, while winning greater than its statewide average vote share in a relatively small fraction of districts. Equivalently, the gerrymandering party will lose big in a small number of districts while winning by closer margins in more districts.

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[2] Those victories occurred in Districts 1, 5, 6, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, and 25. Arizona's Secretary of State, *State of Arizona Official Canvass, General Election* (2014), *available at* http://apps.azsos.gov/election/2014/General/Canvass2014GE.pdf.

Such systematic rigging of districts will generally show up in election results via differences in a party's average district vote share on the one hand, and the median vote share it receives on the other. By packing opposing voters into a small number of districts, the gerrymandering party holds down the targeted party's vote shares in many districts, which depresses the targeted party's median vote share, even while its average (mean) vote share is unchanged. For these reasons, there is evidence of a systematic gerrymander when a party's median vote share is substantially below its average vote share across districts.

In 2014, the Democratic two-party share of the total Senate vote in all 30 Arizona districts was, in terms of percentages and sorted in ascending order:[3]

0.0, 0.0, 0.0, 0.0, 0.0, 29.5, 30.5, 34.1, 34.8, 35.7, 36.8, 37.5, 39.8, 39.9, <u>*41.0*</u>*,* <u>*44.7*</u>*, 46.3,* 50.7, 52.3, 53.8, 55.0, 58.0, 60.3, 62.3, 66.1, 74.3, 100.0, 100.0, 100.0, 100.0.

Races won by Republicans are indicated in italics and the two middle values are underlined. The median percentage is the midpoint of these two middle values, and is equal to 42.8%. The average of the listed Democratic vote share is 46.1%, yielding an average/median difference of 3.3%. Because the median Democratic vote share is less than the average,

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[3] The two-party values here are calculated from the final voter canvass. Unopposed races are indicated by 0.0 or 100.0. *Id.*

the districting map operated in a direction that gives a slight advantage to *Republicans* – the opposite of appellants' contention. Accordingly, the 2014 Senate results indicate that there is no gerrymandering favoring Democrats.

In Arizona's House races, each legislative district has two members. Using the vote share of the Democratic party's top finisher in each district as the basis for calculating the district's vote share, the Democratic two-party share of the total vote in all 30 districts was:[4]

0.0, 0.0, 25.3, 30.5, 32.2, 32.3, 34.1, 34.7, 35.3, 39.4, 39.7, 39.9, 42.7, 43.3, 43.6, 45.5, 46.1, 48.1, 50.4, 51.9, 52.2, 52.5, 54.9, 55.0, 57.8, 59.5, 62.3, 75.9, 100.0, 100.0

where the races are listed in the same way as the Senate races. In this case the Democratic median was 44.5%, and the Democratic average vote share was 46.2%. The difference is a gap of 1.7% – again in a direction that favors Republicans.[5]

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[4] The two-party values here are calculated from the final voter canvass. *Id.*

[5] The question arises of how to treat uncontested races, since the preferences of voters in those districts might differ if the boundaries were drawn differently. Dropping the uncontested races from the calculation, the average-median difference still favors Republicans, by 4.1% for Senate races and by 1.0% in House races. For other approaches to accounting for uncontested races, *see* Andrew Gelman & Gary King, *A Unified Method of*

(Continued on following page)

Thus for both Senate and House seats, the 2014 Arizona state election results indicate that any partisanship effects of the redistricting process actually benefitted Republicans rather than Democrats (though any such benefits were not statistically significant). For purposes of the present case, then, this Court should be skeptical of appellants' assertion that the Commission attempted to systematically disfavor Republican voters: If the Commission was trying to do that, the actual election results indicate that it did a poor job.

The difference between the average and the median does sometimes indicate that there has been systematic gerrymandering. Take the example of Pennsylvania's 2012 Congressional elections. The Democratic candidate's share of the total two-party vote in all 18 districts was, in terms of percentages and sorted in ascending order:

> *34.4, 36.0, 37.1, 38.3, 40.3, 40.6, 41.5, 42.9, 43.2, 43.4, 45.2, 45.2, 48.3*, 60.3, 69.1, 76.9, 84.9, 90.6.

The median percentage is the midpoint of the two middle values – 43.3%. By comparison, the average Democratic vote share is 51.0%. The difference of 7.7% pointed in a direction favoring Republicans, who controlled the post-2010 redistricting. Statistical significance testing, which may be based on statistical

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Evaluating Electoral Systems and Redistricting Plans, 38 AMERICAN JOURNAL OF POLITICAL SCIENCE 514, 550 (1994).

properties of the difference between the average and the median,[6] reveals that such a difference would arise by chance less than 1% of the time.[7] Thus the difference of 7.7% between the average and the median vote share means that Pennsylvania's post-2010 Census map might be viewed as systematically underrepresenting Democratic voters.[8]

The essential point is that deviation from neutrality in districting may be assessed mathematically. The average-median difference test is a straightforward measure of that deviation. It is also true, however, that there exist other measures that will, appropriately, yield closely similar results. For example, one measure compares the difference between the share of Democratic votes in the districts that Democrats win, and the share of Republican votes in the districts *they* win. As with the average-median difference, this

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[6] Karl Pearson, *Contributions to the Mathematical Theory of Evolution, II: Skew Variation in Homogeneous Material*, TRANSACTIONS OF THE ROYAL PHILOSOPHICAL SOCIETY, SERIES A, 186, 343 (1895); G. Udny Yule & Maurice G. Kendall, *An Introduction to the Theory of Statistics* 162-3 (3d ed. 1950).

[7] Samuel S.-H. Wang, *A Three-Prong Standard for Practical Evaluation of Partisan Gerrymandering*, SOCIAL SCIENCE RESEARCH NETWORK 1, 43 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2671607.

[8] There were roughly 5.56 million votes cast in Pennsylvania's 2012 Congressional elections, *Statistics of the Presidential and Congressional Election of November 6, 2012*, Clerk of the U.S. House of Representatives, http://history.house.gov/Institution/Election-Statistics/Election-Statistics/; 7.7% of this figure is 428,000 votes.

test works because in a partisan gerrymander, the targeted party wins lopsided victories in a small number of districts, while the gerrymandering party's wins are engineered to be relatively narrow.

In Arizona's Senate races in 2014, the average winning Republican vote share was 73%, while the average winning Democratic vote share was 72%. This difference – one percentage point – is not statistically significant.[9] In House races, Republicans won with an average of 66% in those districts they won, while Democrats won with 64% in those districts they won (again, the difference was not statistically significant). Like the difference between the average and the median, this second measure also shows that if the Commission was trying to engineer a map that systematically disfavored Arizona Republicans, it did a poor job.

CONCLUSION

In sum, because the results of Arizona's elections are inconsistent with the existence of an effective anti-Republican partisan gerrymander, this Court should reject appellants' argument insofar as it relies

[9] *See* Wang, note 7, *supra*, for details on the computation of statistical significance.

on any such intention by the Commission to disadvantage Republicans.

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